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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 49

LOUISIANA RAILWAY AND NAVIGATION COMPANY,
PLAINTIFF IN ERROR,

vs.

MARTIN BEHRMAN, MAYOR OF THE CITY OF NEW
ORLEANS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED AUGUST 12, 1912.

(23,332)

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vs.

MARTIN BEHRMAN, MAYOR OF THE CITY OF NEW
ORLEANS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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a [Stamp:] Civil District Court, Nov. 22, 1909. Paid.
Thomas Connell, Clerk.

110.00

Sauer.

Binding..... 110.00
1.00

111.00

STATE OF LOUISIANA,
Parish of Orleans,
City of New Orleans:

Civil District Court for the Parish of Orleans.

Civil District Court, Parish of Orleans, Division "C."

No. 79743.

MARTIN BEHRMANN, Mayor of the City of New Orleans,
versus
LOUISIANA RAILWAY & NAVIGATION COMPANY.

Detailed List of All Docket Entries, in Chronological Order, from Docket Number Five, in the Above-numbered and Entitled Cause from the 26th Day of June 1906 (the Date of the Filing Original Petition), to the 2nd Day of November, 1909 (the Date of the Filing of the Appeal Bond), Both Inclusive.

1906.

June	26.	Petition, Affidavit & Order.
"	29.	Writ.
"	29.	Copy of Petition & Citation.
July	3.	Return on Writ.
"	2.	Return on Citation.
September	22.	Application of Defendant for Judgment & Sequestration.
"	25.	Order refused.
<i>b</i>		
October	15.	Prayer for Oyer.
"	15.	2 Copies Petition.
"	19.	Exception to Prayer to Oyer.
"	19.	Return to Copy.
"	29.	Order fixing exception & Notices.
November	2.	Submitted.
"	7.	Return to Notice for Trial.
"	5.	Exception Maintained plea for Oyer dismissed.

it is his legal right to invoke judicial aid for the proper administration of the laws of the State and the ordinances of the City of New Orleans.

Petitioner further avers, that on the 28th day of February 1899 there was adopted by the Council of the City of New Orleans an ordinance, known as Ordinance No. 15,080 Council Series, by the provisions of which a street 110 feet wide, with a neutral ground 50 feet wide in the center thereof, was to be constructed along the river front by the addition of private property to existing streets, between Peniston and Joseph streets, and by the construction of a new street 110 feet wide, with a neutral ground 50 feet wide in the center thereof, along the river front from Joseph street to Hillary street, the whole cost of the private property necessary to construct and operate said widened and extended street, by the terms of said ordinance, to be paid by the Chicago, St. Louis & New Orleans Railroad Company, its lessees, successors and assigns; all private property needed for the widening or opening of said street, under said ordinance, to be and remain perpetually dedicated to public use for street purposes and uses provided for by the ordinance; that by the further terms of said ordinance the Chicago, St. Louis & New Orleans Railroad Company, its lessees, successors and assigns, was bound to locate and construct on the outer or river side of the 50-foot neutral ground hereinabove referred to, and on the outer or river side of the two tracks provided for by said ordinance, for the Chicago, St. Louis and New Orleans Railroad Company, two railroad tracks similar in all respects and constructed in the same manner as the tracks provided for said Railroad Company, with such connecting tracks, cross-overs, spurs and switches to connect each of said tracks with the other, the said Railroad Company being bound to dedicate said two railroad tracks, connecting tracks, spurs and switches, in full ownership and complete title to the City of New Orleans for perpetual public use.

3 Petitioner further avers, that Ordinance No. 15,080 Council Series was duly executed and became a contract, of which the people of the City of New Orleans were the beneficiaries and as such holders and owners of complete title to said two railroad tracks the same to be perpetually used by the public, and became holders and owners of complete title to the outer half of said neutral ground, for the purpose of constructing and maintaining thereon extensions of said railroad tracks, the same to be perpetually used by the public, and that said ordinance is an executed contract protected by the Constitution of the United States, and that the City of New Orleans, by said ordinance, became vested with only the right of administration of said tracks and said outer half of said neutral ground for the public purposes specified by said ordinance and as trustee for the people of the City of New Orleans, and is without right, to make any change or to permit any private or quasi-public use thereof.

Petitioner further avers that on the 7th day of August 1900 there was adopted by the Council of the City New Orleans an ordinance known as Ordinance # 147 New Council Series, by the terms of

which a Belt Railroad Board for the City of New Orleans was created, the objects and purposes of which were to acquire, own, construct, control, maintain and operate in the name of and for the benefit of the City of New Orleans and its citizens a public belt railroad in the City of New Orleans, to be located along the river front from Protection Levee to Louisiana Avenue, to St. Joseph street, to Press street, and to be extended around or through the City upon such streets or roadways as the City Council might designate, and to that end was authorized to contract for, acquire, construct, establish, purchase, or make any contract or agreement which would inure to the municipality of the City of New Orleans and its citizens in respect to a belt railroad system.

- 4 That by the further terms of said ordinance all extensions of tracks to be constructed and maintained under said ordinance were to be connected by the Belt Railroad Board as early as practicable with the public railroad tracks to be constructed by the Chicago, St. Louis & New Orleans Railroad Company under Ordinance No. 15,080 Council Series. By the further terms of said ordinance it was provided that the management and control of the public belt railroad shall be separate and distinct from that of any railroad entering the city of New Orleans and shall forever remain the property of the City of New Orleans, and no employé, director, or officer of any State or interstate railroad shall be employed by or allowed to act as director, commissioner, or manager of the public belt railroad.

Petitioner further avers, that on the 11th day of September 1900 there was adopted by the Council of the City of New Orleans an ordinance, known as Ordinance No. 244 New Council Series by the terms of which the City Engineer was directed to survey the river front from Peniston street to the lower limits of the City, and to make a map similar to a map then on file in his office, designated Belt Railroad Map No. 1, approved July 30, 1900, said map to show the location of all private and public property along the river front and adjacent thereto, between the points above referred to.

- Petitioner further avers, that on the 13th day of August 1902 the Board of Commissioners of the Port of New Orleans adopted a resolution approving the dedication for the purpose of a public belt railroad reservation of certain property on the river front between Toledano and Louisa streets, in so far as it concerned the space or reservation within the jurisdiction of the Board of Commissioners of the Port of New Orleans, the said approval being based upon the express condition that it should remain in force only so long as the public belt is operated and controlled by a public commission in accordance with the provisions of Ordinance No. 147 New Council Series.
- 5

Petitioner further avers, that on the 3rd day of February 1903 there was adopted by the Council of the City of New Orleans an ordinance, known as Ordinance No. 1615 New Council Series, by the terms of which it was purported to grant a right of way to the New Orleans & San Francisco Railroad Company to construct and maintain two railroad tracks and to operate thereover its locomotives

and cars, over the double track belt line and reservation on the river front of the City of New Orleans from the upper limits of the City of New Orleans to Henderson street, upon certain terms and conditions specified in said ordinance.

Petitioner further avers, that on the first day of September 1903 there was adopted by the Council of the City of New Orleans an ordinance, known as Ordinance No. 1997 New Council Series, entitled an ordinance granting rights of way and depot and other rights and privileges to the Louisiana Railway & Navigation Company, its successors, or assigns, failing without legal excuse to build in the event of the New Orleans & San Francisco Railroad Company, its successors, or assigns, failing without legal excuse to build said belt tracks from the upper side of Audubon Park to Henderson street on or about July 1, 1904, said Louisiana Railway & Navigation Company should build the same, from the upper side of Audubon Park to Henderson street, under the terms and conditions of Paragraph 10 of Section 2 of Ordinance No. 1615 New Council Series; and in case said Louisiana Railway & Navigation Company should build said tracks said ordinance purported to grant to it the right and privilege to operate its trains, cars and traffic over said tracks, under all the provisions and terms of said Paragraph 10 of Section 2 of Ordinance No. 1615 New Council Series, said Louisiana Railway & Navigation Company assuming the obligation

6 of the New Orleans & San Francisco Railroad Company under said Paragraph of said Ordinance, and said Ordinance, under said conditions, purported to grant all the rights and privileges of the said New Orleans & San Francisco Railroad Company, its successors or assigns, under said Paragraph 10 of Section 2 of said Ordinance, except as provided in said Ordinance # 1997 New Council Series, said construction of said tracks from the upper side of Audubon Park to Henderson street to be in lieu of the payment of \$50,000 referred to in Paragraph (a) of this section; provided, that said Louisiana Railway & Navigation Company shall complete the said tracks to Henderson street within one year from the time the City shall furnish or acquire an undisputed right of way, it being understood that said Louisiana Railway & Navigation Company should assume all the obligations of the New Orleans & San Francisco Railroad Company under Paragraph 10 of Section 2 of said Ordinance No. 1615 New Council Series, and provided as soon as said belt tracks should be completed to Henderson street the same should be turned over to the immediate ownership of the City of New Orleans and to be under the control and management of the public belt authorities; and provided further, that said Louisiana Railway & Navigation Company should, on July 1, 1904, deposit with the fiscal agent of the City of New Orleans bonds or other securities satisfactory to said fiscal agent, of the value of \$50,000, the same to be held in escrow as security for compliance by said Company with the foregoing obligation, and to be returned to said Company when said Company shall have built and completed said belt tracks from the upper side of Audubon Park to Henderson street; and provided further, that in case said Company shall be

prevented from building said belt tracks or any portion of the same, on account of the City not furnishing the right of way under the terms of Ordinance No. 1615 New Council Series, or by causes beyond its control, then the securities shall be returned to it by said fiscal agent. That the payment of \$50,000, referred to as provided

for by Paragraph (a) of Section 3 of Ordinance # 1997 New Council Series, was a sum to be deposited with the fiscal agent of the City as consideration for the use by said Louisiana Railway & Navigation Company of the two tracks, the right to construct, maintain and operate which was purported to be granted by Ordinance No. 1615 New Council Series.

Petitioner further avers, that by the further terms of Ordinance #1997 New Council Series, it was provided that, in the event the New Orleans & San Francisco Railroad Company, its successors and assigns, should from any cause complete only a portion of the tracks from the upper side of Audubon Park to Henderson street, the Louisiana Railway & Navigation Company, its successors and assigns, should have the right to operate its own locomotives, cars and equipment over such portions of the tracks as were already built and as might be built by the New Orleans & San Francisco Railroad Company, its successors and assigns, and for such privilege should pay to the City of New Orleans such proportion of the sum provided for in paragraph (a) as the tracks so constructed and used by said Louisiana Railway & Navigation Company bore to the whole length of the tracks from the upper city limits to Henderson street.

Petitioner further avers, that on the 8th day of October 1904 there was adopted by the Council of the City of New Orleans an ordinance, known as Ordinance No. 2683 New Council Series, entitled an ordinance amending and re-enacting Sections 1, 2 and 4, and repealing Sections 3, 5, 8, 9 and 11 of Ordinance No. 147 New Council Series, adopted August 7, 1900, adding to said ordinance as new sections a section to be numbered 3 and a section to be numbered 11, and re-numbering Section 10 of said Ordinance, to be known as Section 8. That by the terms of said Ordinance a Board of Commissioners, to be known and styled as the Public Belt Railroad Commission for the City of New Orleans, to be composed of the Mayor of the City of

New Orleans and sixteen citizen taxpayers of the City of New Orleans, was created, to which Commission was granted, by said ordinance, full authority and power to acquire, own, locate, construct, control, maintain and operate in the name of and for the benefit of the people of the City of New Orleans, a double track public belt railway in the City of New Orleans, together with all spur tracks, switch tracks, sidings, cross-overs, locomotives, cars, depots, warehouses, shops, stations, and all other appurtenances to railway location, construction, maintenance and operation.

That by the further terms of said ordinance there was irrevocably dedicated to the people of the City of New Orleans for perpetual and exclusive use as a location for a double track public belt railroad, the title to which location and said double track public belt railroad shall be and shall forever be in the people of the City of New Orleans, a double track belt reservation along the river front, and

along designated streets, to the rear, and along the rear of the City of New Orleans, said double track railway to include the outer half or river side of the strip of neutral ground, said outer half of said neutral ground being 25 feet wide in the center of the street provided for, created by and arranged in and constructed under Ordinance No. 15080 Council Series, now known as Leake Avenue, from the upper Parish line of the Parish of Orleans to Peniston street, said outer half or river side of said neutral ground from the upper parish line of the Parish of Orleans to the upper line of Audubon Park, together with the double tracks constructed thereon, and the outer half or river side of said neutral ground, from the upper line of Audubon Park to Peniston street having been dedicated in full ownership and complete title to the City of New Orleans for perpetual public use.

Petitioner further avers, that by resolution adopted by the Board of Commissioners of the Port of New Orleans, on the 17th day of January 1905, reaffirming under the same terms and conditions its resolution of date August 12, 1902, the Board of Commissioners

of the Port of New Orleans approved the dedication for the purpose of a public belt railroad reservation or place for the double tracks on the river front as defined in Ordinance No. 2683 New Council Series, in so far as the same concerns the space or reservation within the jurisdiction of the Board of Commissioners of the Port of New Orleans, provided that the approval of this Board shall remain in force only as long as the public belt railroad is exclusively operated, managed and controlled by the public belt railroad commission, and that no rights or privileges are granted to any railroad company to control, manage and operate on said tracks.

Petitioner further avers, that said Ordinance No. 1997 New Council Series, entitled an ordinance granting rights of way and depot and other rights and privileges to the Louisiana Railway & Navigation Company, in so far as said ordinance purports to grant to said Louisiana Railway & Navigation Company rights of way or privilege to construct, maintain and operate railroad tracks, or privilege to operate its locomotives, cars and equipment over and along the public belt tracks along the river front, through Leake Avenue from the upper line of the Parish of Orleans to the upper line of *the Parish of Orleans to the upper line of Audubon Park*, and along the river front, through Leake Avenue and connecting streets, from the upper line of Audubon Park to Henderson street, is ultra vires, illegal, null and void for the following among other reasons,

1. That said Ordinance No. 1997 New Council Series, in so far as it purports to grant to the Louisiana Railway & Navigation Company the right to construct, maintain and operate railroad tracks over and along the outer half of the 50-foot neutral ground provided for and dedicated to the people of the City of New Orleans for perpetual public use by Ordinance No. 15,080 Council Series, between the upper line of Audubon Park and Henderson street, and in so far as it purported to grant to said Louisiana Railway & Navigation Company the right, for 99 years to operate over the public tracks dedicated to the people of the City of New

Orleans for perpetual public use by Ordinance No. 15,080 Council Series, between the upper line of the Parish of Orleans and the upper line of Audubon Park, was and is a law divesting the people of the City of New Orleans of their property and rights in and to said public tracks and said outer half of said neutral ground as a public track location, without due process of law, and was and is a law impairing the obligation of the contract made by Ordinance No. 15,080 Council Series, of which the people of the City of New Orleans were the beneficiaries, and is in violation of Article 2 and 166 of the Constitution of the State of Louisiana and Paragraph 1, of Section 10 of Article 1 of the Fifth Amendment to the Constitution of the United States.

2. That Ordinance No. 1997 New Council Series, in so far as it purports to grant rights of way, and the privilege or privileges to construct, maintain and operate tracks, and the privilege to operate for 99 years with its locomotives and equipment over and along the public belt tracks constructed under and dedicated by Ordinance No. 15080 Council Series along the river front, through Leake Avenue from the upper Line of the Parish of Orleans to the upper line of Audubon Park, and over and along the public belt reservation constructed under and dedicated to the people of the City of New Orleans by Ordinance No. 15080 Council Series, through Leake Avenue and connecting streets between the upper line of Audubon Park and Henderson street, was and is a purported grant of rights of way and privileges beyond the legal competency of the Council of the City of New Orleans.

That by decree of the Honorable Supreme Court of the State of Louisiana, in the case of the Board of Commissioners of the Port of New Orleans vs. the New Orleans & San Francisco Railroad Company, et als., decided on or about May 23, 1904, and reported in the 112th Louisiana reports at page 1011 et seq., Ordinance No. 1615 New Council Series, in so far as it purported to grant rights of way over and along the river front between Toledano and Henderson streets, through territory over which the Board of Commissioners of the Port of New Orleans had exclusive jurisdiction and administration, was ultra vires, null and void, the City of New Orleans having no present jurisdiction over said territory and hence no power, without the consent of the said Board of Commissioners of the Port of New Orleans, to authorize the construction and maintenance of any railroad thereon. That said Ordinance No. 1997 New Council Series has never been approved, ratified or confirmed by the Board of Commissioners of the Port of New Orleans, but on the contrary, is contrary in letter and spirit to the resolutions of the Board of Commissioners of the Port of New Orleans approving, ratifying and confirming Ordinance No. 147 New Council Series and Ordinance No. 2683 New Council Series. That as Ordinance No. 1997 New Council Series only purported to grant to the Louisiana Railway & Navigation Company the right to build tracks and to operate trains, cars and traffic over said tracks along the river front, from the upper side of Audubon Park to Henderson Street in the event of the New Orleans & San Francisco Railroad Company,

its successors or assigns, failing without legal excuse to build said tracks and as, under the decree of the Supreme Court of the State, hereinabove referred to, the grant to the New Orleans & San Francisco Railroad Company to build tracks from the upper side of Audubon Park to Henderson street was declared ultra vires, null and void, no grant of any right of way or privilege to construct, maintain or operate tracks, or to operate trains, cars and traffic over tracks between the upper side of Audubon Park and Henderson street was ever granted to said Louisiana Railway & Navigation Company.

That said grant to the New Orleans & San Francisco Railroad Company to construct, maintain and operate tracks between the upper side of Audubon Park and Henderson street, and the grant to the Louisiana Railway & Navigation Company in the event the New Orleans & San Francisco Railroad Company failed without legal excuse to build said tracks, was a purported grant indivisible in character, of a right of way and privilege to construct, maintain and operate two tracks along the river front from the upper side of Audubon Park to Henderson street, which conferred upon said New Orleans & San Francisco Railroad Company, and contingently upon the Louisiana Railway & Navigation Company, no right or privilege to build less than the entire length of tracks, or to construct, maintain and operate tracks over parts or portions of said river front anywhere between the upper line of Audubon Park to Henderson street.

That Ordinance No. 1997 New Council Series only bound and required the Louisiana Railway & Navigation Company, in the event of the failure of the New Orleans & San Francisco Railroad Company without legal excuse to build tracks from the upper side of Audubon Park to Henderson street, to complete said tracks to Henderson street within one year from the time the City should furnish the clear and undisputed right of way, and provided further that in case said Louisiana Railway & Navigation Company should be prevented from building said tracks or any portion of the same, on account of the City not furnishing the right of way under the terms of Ordinance No. 1615 New Council Series, or by causes beyond its control, the bonds to the value of \$50,000 deposited by said Company with the fiscal agent as security for compliance by said Company with its purported obligation should be returned to it. That the Council of the City of New Orleans was and is, as established by the decision of the Supreme Court of the State in the case of the Board of Commissioners of the Port of New Orleans vs. The New Orleans & San Francisco Railroad Company, without power and authority to furnish the right of way purported to be granted by Ordinance No. 1615 New Council Series, and was and is prevented by causes beyond its control, from granting rights of way or privileges to construct, maintain and operate railroad tracks or a railroad system along the neutral ground of Leake Avenue and connecting streets from Audubon Park to Henderson street, and was and is without power or authority to grant a right and use for 99 years, or for any other term for the operation

by said Louisiana Railway & Navigation Company, with its locomotives, cars and equipment, over the public belt railroad tracks constructed under Ordinance No. 15,080 Council Series between the upper line of the Parish of Orleans and the upper line of Audubon Park.

3rd. That Ordinance No. 1997 New Council Series only purported to grant to the Louisiana Railway & Navigation Company, its successors and assigns the right, in the event the New Orleans & San Francisco Railroad Company, its successors and assigns should, from any cause, complete only a portion of the tracks from the upper side of Audubon Park to Henderson street, to operate its own locomotives, cars and equipment over the public belt tracks between the upper line of the Parish of Orleans and the upper line of Audubon Park and over such tracks as might be built by the New Orleans & San Francisco Railroad Company, its successors and assigns between the upper line of Audubon Park and Henderson street. That the New Orleans & San Francisco Railroad Company has never built any tracks between the upper line of Audubon Park and Henderson street, and the right purported to be granted by Ordinance No. 1997 New Council Series to the Louisiana Railway & Navigation Company to operate its own locomotives, cars and equipment over the public belt tracks was based on the condition that the New Orleans & San Francisco Railroad Company should complete a portion of the tracks from the upper side of Audubon Park to Henderson street. That moreover Ordinance No. 1997 New Council Series, in so far as it purported to grant to the Louisiana Railway & Navigation Company, its successors and assigns, the right to operate its own locomotives, cars and equipment over the public belt tracks between the upper line of the Parish of Orleans and the upper line of Audubon Park, was a law divesting the vested property rights acquired under and impairing the obligation of the contract made by Ordinance No. 15,080 Council Series.

14 4th. That by the terms of Ordinance No. 1997 N. C. S. the Louisiana Railway & Navigation Company was unconditionally required, in order to become entitled to the right purported to be granted to it to construct and maintain tracks from the upper side of Audubon Park to Henderson street in the event that the New Orleans & San Francisco Railroad Company, its successors and assigns, should fail without legal excuse to build said tracks or to operate its locomotives, cars and equipment over the public belt tracks between the upper line of the Parish of Orleans and the upper line of Audubon Park, to deposit on or before July 1, 1904, with the fiscal agent of the City of New Orleans bonds or other securities satisfactory to said fiscal agent, of the value of \$50,000 the same to be held in escrow as security for compliance by said Company with its aforesaid contingent obligation, and that no deposit of bonds or other securities to the value of \$50,000, or of any value were deposited by said Company with the fiscal agent of the City of New Orleans on or before July 1, 1904, as security, in accordance with the terms of Ordinance #1997 N. C. S.

Petitioner further avers that the City of New Orleans has complied

with, has executed, and is executing Ordinance #147 New Council Series, and Ordinance No. 2683 New Council Series, and is at this time in possession of the outer half of the neutral ground of Leake Avenue and connecting streets between the upper line of Audubon Park and Henderson streets and has at this time actually constructed and is constructing public belt railroad tracks on the outer half of said neutral ground, connecting the same with the public belt tracks constructed under and dedicated by Ordinance #15,080 Council Series, between the upper line of the Parish of Orleans and the upper line of Audubon Park.

Petitioner further avers, that unless restrained by order of this Honorable Court said Louisiana Railway & Navigation Company will undertake to execute and carry into effect said ordinance

15 #1997 New Council Series and exercise the rights and privileges purported to be granted to said Company by said Ordinance along the river front between the upper line of the Parish of Orleans and Henderson street, or to assign or hypothecate the rights and privileges purported to be granted to said Louisiana Railway & Navigation Company by said Ordinance #1997 New Council Series, to third persons, who may assert claims thereunder and undertake to execute and carry into effect said ordinance in so far as said tracks are concerned, to the irreparable injury of the incorporators of the City of New Orleans, whom petitioner in his official capacity herein represents, and of whom petitioner, is one.

Petitioner further avers, that by section 117 of the charter of the City of New Orleans the City of New Orleans is dispensed from furnishing bond and security in all judicial proceedings where by law bond and security are required from litigants, and that in this proceeding your petitioner is acting in his official capacity for and on behalf of the City of New Orleans and the incorporators thereof, and is not, by law, required to furnish bond and security.

Wherefore petitioner prays, in his official capacity, that a writ of injunction pendente lite issue herein, without bond, addressed to the Louisiana Railway & Navigation Company through its proper officer, enjoining and restraining said Louisiana Railway & Navigation Company, its lessees, transferees, successors and assigns, its officers, employees, and agents, from in any manner attempting to execute in whole or in part, and from executing in whole or in part, Ordinance #1997 New Council Series, in so far as said ordinance purports to grant to said Louisiana Railway & Navigation Company any rights of way or privileges to construct, maintain and operate tracks, or to operate cars, locomotives or other equipment over and along the

16 public belt tracks between the upper line of the Parish of Orleans and the upper line of Audubon Park, and over and along the outer half of the neutral ground and public belt reservation through Leake Avenue and connecting streets between the upper line of Audubon Park and Henderson streets, and from assigning or hypothecating to any person or corporation any such right or privilege, and from interfering with impeding or attempting to prevent the construction, by the City of New Orleans, directly, or through or by the Public Belt Railroad Commission of the City

of New Orleans, of public belt tracks on the outer half of the neutral ground and public belt reservation through Leake Avenue and connecting streets between the upper line of Audubon Park and Henderson street, and from the operation of public belt locomotives, cars and equipment over the public belt tracks between the upper line of the Parish of Orleans and the upper line of Audubon Park, over the public belt tracks constructed or to be constructed upon the public belt reservation from the upper line of Audubon Park to Henderson street; and petitioner, prays that the said Louisiana Railway & Navigation Company be cited to appear and answer this petition and that after all due proceedings had there be judgment in favor of petitioner in his official and individual capacities, and against said Louisiana Railway & Navigation Company, its lessees, transferees, successors and assigns, declaring said Ordinance #1997 New Council Series, in so far as it purports to grant to said Louisiana Railway & Navigation Company any rights of way or privileges to construct, maintain and operate railroad tracks on the outer half of the neutral ground or public belt reservation through Leake Avenue and connecting streets, from the upper line of Audubon Park to Henderson street, or to operate locomotives, cars or other equipment over the public belt tracks between the upper line of the Parish of Orleans and the upper line of Audubon Park, or over the outer half of the neutral ground or public belt reservation through Leake Avenue, from the upper line of Audubon Park to Henderson street, to be ultra vires, null, void, and of no effect, and perpetuating said preliminary injunction; for costs and for general relief.

(Signed)

SAM'L L. GILMORE,

City Attorney.

(Signed)

ARTHUR McGUIRK,

*Assistant City Attorney, Special Counsel
for Public Belt R. R. Comm'n.*

STATE OF LOUISIANA,

Parish of Orleans:

Before me the undersigned authority, personally came and appeared Martin Behrman, Mayor of the City of New Orleans, to me personally known, who being by me first duly sworn, deposes and says that the facts stated in the foregoing petition are true, and that the statements of law hereinabove contained are true to the best of his knowledge and belief.

(Signed)

MARTIN BEHRMAN.

Sworn to and subscribed before me, Notary, this 26th day of June, 1906.

[SEAL.]

(Signed)

CHAS. B. UPTON,

Not. Pub.

Order.

Let an injunction issue herein as prayed for and without bond.
New Orleans, June 27th, 1906.

(Signed)

JOHN ST. PAUL, *Judge.*

18

Writ of Injunction and Sheriff's Return Thereon.

Filed July 3rd, 1906.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

No. 79743.

MARTIN BEHRMAN, Mayor of the City of New Orleans,
versus
LOUISIANA RAILWAY & NAVIGATION COMPANY.

State of Louisiana to the Louisiana Railway and Navigation Company, New Orleans, Greeting:

You your lessees, transferees, successors and assigns, your officers, employees and agents, are hereby commanded in the name of the State of Louisiana and of the Civil District Court for the Parish of Orleans, from in any manner attempting to execute in whole or in part and from executing in whole or in part, ordinance #1997 New Council Series in so far as said ordinance purports to grant to you any rights of way or privileges to construct, maintain and operate tracks, or to operate cars, locomotives or other equipments over and along the public belt tracks between the upper line of the Parish of Orleans and the upper line of Audubon Park, and over and along the outer half of the neutral ground and public belt reservation through Leake Avenue and connecting streets between the upper line of Audubon Park and Henderson street, and from assigning or hypothecating to any person or corporation any such right or privilege, and from interfering with, impeding or attempting to prevent the construction, by the City of New Orleans, directly, or through or by the public belt Railroad Commission of the City of New Orleans, of public belt tracks on the outer half

19 of the neutral ground and public belt reservation through Leake Avenue and connecting streets between the upper line of Audubon Park and Henderson street, and from the operation of public belt locomotive, cars and equipment over the public belt tracks between the upper line of the Parish of Orleans and the upper line of Audubon Park, over the public belt tracks constructed or to be constructed upon the public belt reservation from the upper line of Audubon Park to Henderson Street.

And you are so to remain enjoined and restrained until the further order of this Court.

Witness the Honorables T. C. W. Ellis, Fred D. King, Geo. H. Theard, John St. Paul and W. B. Sommerville, Judges of our said Court, this 29th day of June in the year of our Lord, one thousand nine hundred and six and in the one hundred and 30th year of the Independence of the United States.

[SEAL.]

(Signed)

J. McCORMICK,
Deputy Clerk.

Sheriff's Return.

Received Friday, June 29, 1906, And on the 30th day of June, 1906 at 11:30 A. M., I served a copy of the within writ of Injunction on the Louisiana Railway & Navigation Company defendant herein by personal service on John Albion Saxton its general agent.

Return same day.

(Signed)

C. M. GOSS,
Deputy Sheriff.

Sheriff's fees \$2.00.

20 *Application of Defendant for Judgment and Sequestration.*

Filed September 22nd, 1909.

Civil District Court for the Parish of Orleans, Division "C."

No. 79743.

MARTIN BEHRMAN, Mayor, etc.,

vs.

LOUISIANA RY. & NAV'G'N CO.

Comes now the defendant, the Louisiana Railway & Navigation Company, by its attorneys, Foster, Milling, Godchaux & Sanders, and with respect shows unto the Court:

That on the first day of September, 1903, there was adopted by the City Council of the City of New Orleans an ordinance known as No. 1997 New Council Series, entitled "An Ordinance granting rights of way and depot and other rights and privileges to the Louisiana Railway & Navigation Company", by the terms of which this defendant, among other things, was granted a servitude or right of way over the double track belt line and reservation on the River front in the city of New Orleans, from the upper limits of the City of New Orleans to Henderson street; and by the further terms of which it was granted the right, and it was made its duty, to construct two railroad tracks on and over said belt line reservation from the upper side of Audubon Park (where the present belt tracks now end) to Henderson Street; said ordinance further granting to defendant the right and privilege to operate its cars, trains

and traffic over the already completed belt tracks as well as those tracks that may hereafter be constructed.

Defendant further shows that on or about the 16th day of May, 1906, it proceeded to take possession of, and to use, the right of way and privileges granted to it under said ordinance, and did attempt to comply with its obligation to construct the belt tracks aforesaid; but that the City of New Orleans, acting through its Mayor and the

21 Police Department of the City, with force and arms prevented your defendant, its agents and employes, from using or taking possession of said right of way, servitude and privileges, and from constructing any part or portion of said tracks.

Now defendant shows that, as will appear from Plaintiff's petition herein, the sole and only purpose of this present proceeding is to have declared ultra vires, null, void and of no effect said ordinance No. 1997 N. C. S., insofar as it purports to grant to this defendant the aforesaid servitude or right of way over the belt line and reservation, and the right to construct the aforesaid tracks thereon and to operate its cars, trains and traffic over the tracks already completed or that may hereafter be constructed, and to that end, the said plaintiff has, by ex parte application herein, obtained a preliminary injunction from this Honorable Court, which is still in force, the effect of which is to prevent this defendant, during the pendency of this proceeding, from attempting to exercise and enjoy the said servitude and right of operation and other privileges over the aforesaid belt reservation and the belt tracks already built and to be constructed, and likewise to enjoin and prohibit this defendant not only from building the two belt tracks over the belt reservation from the upper side of Audubon Park to Henderson street, but also from in any manner impeding or interfering with or attempting to prevent the construction of said two tracks by the plaintiff.

Defendant further shows that plaintiff, taking advantage of said writ of injunction, which not only deprives defendant, temporarily at least, from enforcing its contract right to build said tracks, but enjoins it from preventing the construction thereof by the plaintiff, has, within the past two weeks, purchased and secured rails and other material, and is now actively engaged in constructing the two

22 belt railroad tracks on and over the belt reservation from the upper side of Audubon Park to Henderson street, which tracks by the terms of the ordinance aforesaid, this defendant was especially authorized and obligated to construct and the plaintiff has publicly announced its intention and determination to continue and complete the construction of said tracks, notwithstanding the pendency of this suit in which plaintiff itself is seeking to question defendant's right to construct said tracks.

Defendant further shows that it has continually protested against this action on the part of plaintiff and has made repeated demands upon the said plaintiff not to inaugurate or continue the said work; but these protests and demands have been in vain, the scheme, purpose and intention of plaintiff being apparently to deprive defendant of its rights and privileges without a hearing and in advance of judicial sanction, and, by itself constructing said tracks

during the pendency of this proceeding, to render abortive, futile and nugatory any judgment that might be herein rendered recognizing defendant's exclusive right to build said tracks as conferred on it by the ordinance aforesaid, and thus whether plaintiff's pretensions in this proceeding are sustained or denied, achieve a failure of justice to the irreparable loss injury and prejudice of this defendant.

Defendant further shows that notwithstanding that plaintiff has no more apparent right to the possession of the property in dispute than has this defendant, the said plaintiff has by the unconscionable and unjust use of the process of this Honorable Court, secured possession of the property; and if such possession is permitted to continue, defendant's rights in the premises will be defeated and destroyed.

Defendant shows that the general equity powers of the Court should be exercised in the premises in order to avoid a failure of justice and prevent this defendant from being illegally deprived of its rights without trial or hearing and defendant suggests to this

23 Honorable Court, that a proper case is here presented wherein the Court should in its proper discretion, order ex-officio the judicial sequestration of the public belt reservation in the City from the upper line of Audubon Park to Henderson street, and the right of way of servitude granted to this defendant thereon, and should continue said sequestration until the issues with regard to said property shall have been herein finally adjudicated upon.

Wherefore, defendant prays that this Honorable Court that in the exercise of its discretion it render such orders as may be just expedient and necessary, and particularly such as will preserve the status quo of the premises in dispute pending this proceeding and will protect the rights of all parties until a final judgment has been rendered herein.

(Signed)

FOSTER, MILLING, GODCHAUX &
SANDERS,

Attorneys for Defendant.

Personally appeared Mr. John Albion Saxton of the City of New Orleans, who, being first duly sworn, deposes and says:

That he is General Agent of the Louisiana Railway & Navigation Company, defendant in the above entitled and numbered cause; that he has read the foregoing application or motion, and that all the facts and allegations therein contained are true and correct.

(Signed)

JOHN ALBION SAXTON.

Sworn to and subscribed before me, at New Orleans, La., this 20th day of September, 1906.

(Signed)

ALEXIS BRIAN,
Notary Public.

[SEAL.]

24 *Reasons for Judgment upon Application of the Defendant
for Writ of Sequestration.*

September 25th, 1906.

No. 79743.

Civil District Court, Division "C."

MARTIN BEHRMAN, Mayor of the City of New Orleans,

vs.

LOUISIANA RAILWAY & NAVIGATION Co.

Reasons for Judgment upon Application of the Defendant for Writ
of Sequestration.

This suit, which is an application for an injunction against the defendant, was filed on the 26th day of June, 1906, no action was taken thereon by the Court until the following day, and no one appearing, the Judge of Division "C," to whom the case was allotted, issued a preliminary injunction. Since that time, nothing has been done in the case, it not having been put at issue until now by the filing of an answer. In this answer, application is made to me, in the absence of Judge St. Paul, for a writ of sequestration to be issued under Article 274 of the Code of Practice, as stated by counsel for the defendant. The case not having gone to trial, and nothing having occurred during the last ninety days, in the presence or to the knowledge of the court, the status quo should not be disturbed.

If the issuance of the injunction herein has worked hardships upon the defendant, it might have moved for the dissolution of the writ. The court will not act *ex officio* or *ex proprio motu*, and order the issuance of a writ of sequestration which will have the effect of nullifying an injunction by the judge of Division "C," to which Division this case is allotted. The writ asked for would have the effect of an injunction in favor of the defendant and against the plaintiff, without bond; and this is not permitted under the article of the Code. Or, it may be said that the writ is more in the nature of a judicial deposit, and the court hesitates to place in the hands of the sheriff a railroad which is in the course of construction, where the Sheriff would be utterly unable to continue said construction.

It cannot be presumed that that officer would have the
25 knowledge or money necessary to build a railroad, and the
work would necessarily have to be stopped during the pendency of the suit.

The application for a writ of sequestration is addressed entirely to the discretion of the court, and for the reasons given above, the application is denied.

New Orleans, Sept. 25, 1906.

(Signed)

W. B. SOMMERVILLE, Judge.

Prayer for Oyer and Order.

Filed October 15th, 1906.

No. 79743.

Civil District Court for the Parish of Orleans, Division "C."

MARTIN BEHRMAN, Mayor, etc.,

vs.

LOUISIANA RAILWAY & NAVIGATION Co.

Now into court comes the Louisiana Railway & Navigation Company, defendant herein, and avers that it is unable to plead, except or answer in this cause, without oyer of the original or duly authenticated copies of the following documents upon which plaintiff's action is founded, viz:

Ordinance No. 15,080, Council Series, adopted Feb. 28th, 1899;

Ordinance No. 147, New Council Series, adopted August 7th, 1900;

Ordinance No. 244, New Council Series, adopted September 11th, 1900;

Resolution of the Board of Commissioners of the Port of New Orleans, adopted August 13th, 1902;

Ordinance No. 1615, New Council Series, adopted February 3rd, 1903;

Ordinance No. 1997, New Council Series, adopted September 1st, 1903;

Ordinance No. 2683, New Council Series, adopted October 8th, 1904;

Resolution of the Board of Commissioners of the Port of New Orleans, adopted January 17th, 1905.

26

Wherefore, this appearer prays for oyer of said documents, and that it be relieved from pleading or answering herein until same shall be filed in the office of the Clerk of this Court; and that if the same shall not be filed within — days, plaintiff's demand as against this appearer be dismissed as in case of non-suit, with costs. And defendant prays for general relief.

(Signed)

FOSTER, MILLING, GODCHAUX &
SANDERS,*Attorneys for Defendant.**Order.*

Considering the foregoing prayer for oyer, it is ordered that the plaintiff herein be and he is hereby commanded to produce and file with the Clerk of this Court the original or duly authenticated copies of the documents declared on in his petition, and enumerated above by the defendant, within 10 days; and in default of his com-

pliance with this order within the time aforesaid, that his petition be dismissed with costs.

New Orleans, October 15th, 1906.

(Signed)

JOHN ST. PAUL, *Judge*.

27 *Exception to Defendant's Petition for Oyer.*

Filed October 19, 1906.

No. 79743.

Civil District Court, Division C.

MARTIN BEHRMAN, Mayor,

vs.

LOUISIANA RAILWAY & NAVIGATION CO.

To the Honorable the Judges of the Civil District Court in and for the Parish of Orleans:

Now into this Honorable Court comes Martin Behrman, herein appearing and acting in his official capacity as Mayor of the City of New Orleans and as Ex-officio President of the Public Belt Railroad Commission of the City of New Orleans, and for exception to defendant's petition or prayer for oyer of the original or duly authenticated copies of certain documents referred to and made part of the defendant's petition herein, and for answer to the order of this Honorable Court, directing the plaintiff herein to produce and file with the Clerk of this Court the original or duly authenticated copies of the documents alleged to be declared on in plaintiff's petition, and enumerated in defendant's petition or prayer for oyer, within ten days from October 15th, 1906, the date of said order, says that the defendant herein, on the 22nd day of September 1906, filed its answer to plaintiff's petition in the above entitled and numbered cause, and that defendant's petition or prayer for oyer cannot now be entertained or the defendant allowed to except, plead or supplement its answer in this cause, unless said supplemental answer be allowable under the laws and rules governing the practice of this Honorable Court, the above entitled and numbered cause being at issue.

28 That all of the ordinances enumerated in defendant's petition or prayer for oyer are part of the governmental public records of the City of New Orleans, accessible at all times to the defendant, and include Ordinance No. 1997 New Council Series, adopted September 1, 1903, which is the ordinance declared on by defendant in its answer filed in this Honorable Court on the 22nd day of September 1906. That the resolutions of the Board of Commissioners of the Port of New Orleans enumerated in defendant's petition or prayer for oyer are part of the governmental public records of said Board and are accessible at all times to the defendant.

Wherefore petitioner prays that this exception be maintained, and

that defendant's petition or prayer for oyer be dismissed, and that the order of this Honorable Court made on October 15, 1906, directing the plaintiff herein to produce and file with the clerk of Court the original or duly authenticated copies of the documents referred to in defendant's petition or prayer for oyer, be vacated, annulled and set aside, and that in case these exceptions be overruled, and not otherwise, this defendant be allowed a delay of ten days from the date of the judgment on these exceptions within which to file the original or duly authenticated copies of the documents recited in defendant's petition or prayer for oyer.

(Signed)

SAM'L L. GILMORE,
City Att'y.

(Signed)

ARTHUR McGUIRK,
Special Ass't City Attorney.

29

Motion to Fix Exception.

Filed October 29th, 1906.

Civil District Court, Division C.

No. 79743.

MARTIN BEHRMAN, Mayor,

vs.

LOUISIANA RAILWAY & NAVIGATION Co.

On motion of Samuel L. Gilmore City Attorney, attorney for plaintiff.

It is ordered that plaintiff's exception to the petition for oyer herein *be* filed by the defendant be set down for trial on Friday, November 2, 1906, at 11 o'clock A. M., and that defendant be notified of such fixing.

(Signed)

F., M., G. & S.

Exception Submitted.

Extracts from the Minutes of Division "C," Friday, November 2nd, 1906.

Present: The Honorable John St. Paul, Judge.

After hearing pleadings and argument of Arthur McGuirk Esq., Attorney for plaintiff and of Jared Y. Sanders Esq., Attorney for defendant; plaintiff's Exception to plea for oyer was submitted and taken under advisement.

Exception Maintained, Plea for Oyer Dismissed.

Extracts from the Minutes of Division "C," Monday, November 5th,
1906.

Present: The Honorable John St. Paul, Judge.

In this case submitted for adjudication, the Court considering the law to be in favor of the plaintiff and against the defendant, and for the reasons orally assigned, in open Court, on this day. It is ordered that plaintiff's Exception to defendant's plea for Oyer be maintained; that said plea for Oyer be dismissed and defendant is allowed ten days to answer.

30

Exception.

Filed October 8th, 1908.

Civil District Court, Parish of Orleans, Division "C."

No. 79743.

MARTIN BEHRMANN, Mayor, et als.,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

Now into Court comes the defendant herein through undersigned counsel and before answering to the merits and reserving its right to further except and answer shows unto the Court.

That the plaintiff herein, the Mayor of the City of New Orleans, attempts to appear in his dual capacity as Mayor of the City of New Orleans and as President of the Public Belt Railroad Commission of said City. Exceptor shows that the Public Belt Railroad Commission has no right to stand in judgment or prosecute this demand either collectively as a commission or through its President, no such authority being delegated to it by the Ordinance creating it, such authority being lodged only in the City of New Orleans.

It further shows that the said petition in so far as said Mayor appears in his capacity as President of the Public Belt Railroad Commission should be dismissed.

In the alternative, in the event the Court should hold that the Public Belt Railroad Commission of the City of New Orleans has the *has the* right to stand in judgment and prosecute this suit, then exceptor shows that the said Mayor acting as President of the said Public Belt Railroad Commission has no right to institute said suit, as such suit must be instituted by the Commission itself, and then only after a resolution authorizing the institution of such suit has been passed by the Board, which has not been done in the case
at bar.

31 Wherefore, exceptor prays that the exception herein as to the capacity of the Mayor as President of the Public Belt Railroad Commission and of the authority of said Commission to appear as parties to this suit and prosecute this demand be sustained and that said suit be dismissed as to said plaintiffs at its cost and for general relief.

(Signed)

FOSTER, MILLING & GODCHAUX,
ALEXIS BRIAN,
WISE, RANDOLPH & RENDALL,
Att'ys for Exceptor.

Motion to File Exception & Answer Without Prejudice.

Filed October 8th, 1908.

Civil District Court, Parish of Orleans, Division "C."

No. 79743.

MARTIN BEHRMANN, Mayor, et als.,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

On motion of defendant, the Louisiana Railway & Navigation Company, through its attorneys, Foster, Milling & Godchaux and Alexis Brian and Wise, Randolph & Randell, and on suggesting to the Court that some months ago the above styled and numbered suit was filed in your Honorable Court; that same was not put at issue either by exception or by answer for the reason that compromise negotiations followed, and there was a hope of effecting a compromise without litigation; that said hope was now ceased; that your defendant now desires to speed the cause and desires to file certain exceptions to said petition along with its answer thereto and to have said exceptions tried before trying the merits; that as the filing of said exceptions separately might delay the final disposition of the case, it files herewith both said exceptions and answer and that in

32 order to preserve all its legal rights, it desires authority of the Court therefor.

It is ordered, That the defendant herein be permitted to file its exceptions and answer at the same time with the right reserved to have said exceptions tried and passed upon before trying the merits of the case and without in any manner waiving any of its rights under the exceptions by filing said exceptions and answer at the same time.

(Signed)

W. B. S.

Exceptions and Answer.

Filed October 8th, 1908.

Civil District Court, Parish of Orleans, Division "C."

No. 79745.

MARTIN BEHRMANN, Mayor, et als.,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

Now into this Honorable Court again appears the defendant in the above styled and numbered suit, through undersigned Counsel, and reserving the benefit of the exceptions heretofore filed, and reserving the right to further except and answer, should this exception be overruled, and insisting that same shall be passed upon before passing upon the merits of the cause, pleads the further exception of res adjudicata predicated upon the following facts: That on the 10th day of February, 1903, the City Council of the City of New Orleans passed Ordinance No. 1615 N. C. S. granting to the New Orleans & San Francisco Railroad Company a right of way over certain streets, and certain portions of the river front in the City of New Orleans, that the said New Orleans & San Francisco Railroad Company by said Ordinance was granted a right of way over the public belt line and reservation on the river front, on condition, that it should construct a portion of said public belt line, all as will more fully appear from Paragraph No. 10, section 2 of Ordinance No. 1615 N. C. S., which is attached hereto and made part hereof.

That after the passage of Ordinance No. 1615 N. C. S., your defendant applied to the City Council of the City of New Orleans for certain rights of way and depot privileges in the City of New Orleans and for certain rights of way in order to reach the river front of the City of New Orleans, it being a railroad corporation, and it being necessary for it to own and control terminals upon the river front; that the said City Council of New Orleans passed Ordinance No. 1997 N. C. S. approved September 4, 1903, granting to your defendant rights of way over certain streets of the City of New Orleans for the purpose of reaching its depots, and also granted it a right of way over the belt railroad and the belt reservation which at that time it was contemplated would be built by the New Orleans & San Francisco Railroad Company.

That it was provided in said Ordinance No. 1997 N. C. S. that in the event the New Orleans & San Francisco Railroad Company, its successors or assigns should fail to build the said public belt tracks without legal excuse, from the upper side of Audubon Park to Henderson Street, on or before July 1, 1904, then your defendant should build the same and as contemplated the same should be built by the New Orleans & San Francisco Railroad Company, under its

Ordinance, especially under Paragraph No. 10 of Section Two of said Ordinance, all of which will more fully and at large appear by reference to Ordinance No. 1997 N. C. S., above referred to and attached hereto and made part hereof.

Your defendant shows that on February 20, 1903, Paul Capdevielle, Mayor of the City of New Orleans, instituted suit No. 69,886, in the Civil District Court for the Parish of Orleans, in which he made substantially all the allegations that are made in the present suit, contesting the validity of the Ordinance No. 1615 N. C. S., and asking the Court to declare it illegal, null and beyond the power of the City Council of the City of New Orleans to grant such right of way.

That a decision was rendered adverse to the contention of the Mayor, in the Civil District Court for the Parish of Orleans, an appeal was taken to the Supreme Court of the State of Louisiana, and the judgment of the District Court was affirmed and the opinion is now final and reported in the 110 La., page 904.

That while said case was pending in the Supreme Court, your defendant having in view its then contemplated Ordinance, by the consent of the Court, appeared in said cause and asked that certain rights in connection with the use of the public belt track be specifically defined in the event that same was built by the New Orleans & San Francisco Railroad Company; that said judgment fully adjudicated the rights of the respective parties under Ordinance No. 1615 N. C. S., and the Court there held that the City of New Orleans did have the authority therein, that it and its officers were bound by the ordinance and that it must in good faith carry the terms of said Ordinance out.

That under Ordinance No. 1997 N. C. S. granted to your defendant as aforesaid, it succeeded to the rights of the New Orleans & San Francisco Railroad Company to construct the said public belt railroad, and the said Martin Behrmann, Mayor, is the successor of Paul Capdevielle; and as the said Behrmann, Mayor, by his petition in this cause now pending before your Honorable Court is attempting to raise the same issues as were raised in suit No. 69,886, Paul Capdevielle, Mayor, vs. New Orleans San Francisco Railroad Company, and as this suit is between the same parties or their successors, the said City is bound by said judgment, and said judgment is a complete bar against the right of the City of New Orleans and Martin Behrmann, Mayor, to again raise the issues passed upon and finally adjudged in the aforesaid suit.

35 It shows that the said issues raised in said suit being the same as the issues raised in the present suit, the question is now res adjudicata, as to the validity of the Ordinance No. 1615 N. C. S. especially that part of said Ordinance, being Section 2. paragraph 10, under which the public belt railroad was to be constructed, which plea of res adjudicata your defendant especially pleads.

Wherefore defendant prays that the plea of res adjudicata be maintained at plaintiff's cost.

Reserving the benefit of the foregoing exception and insisting that

same be passed upon before considering the merits of the cause, and reserving the right to further except and answer, your defendant now pleads the other and further exception of judicial estoppel based upon the following judicial proceedings:—

That after the adoption of Ordinance No. 1615 N. C. S. as above set forth, there was instituted by the Board of Commissioners of the Port of New Orleans, a suit entitled "Board of Commissioners for the Port of Orleans vs. New Orleans & San Francisco Railroad Company," No. 69,984, of the docket of the Civil District Court for the Parish of Orleans, filed March 9, 1903, in which the said Board asked the annulment of Ordinance No. 1615 N. C. S., and especially that part of the same which Granted to the New Orleans & San Francisco Railroad Company the right to construct and use the public belt over the public belt reservation on the river front and especially that part of the river front which was under the control of the plaintiff.

That the City of New Orleans, being made party defendant to said suit, appeared in said cause through counsel and answered, pleading the validity of said Ordinance in the following language:

"For further answer this respondent says that in so far as Ordinance No. 1615 N. C. S. accorded to the New Orleans & San

36 "Francisco Railroad Company a right of way over the public domain and particularly over the City's property facing

"the Mississippi River, more especially set out in the Ordinance referred to, it was an effective and valid exercise of the City's legislative power, the said City of New Orleans having full authority to accord the grant as recited in said Ordinance."

Your exceptor further shows that, acting upon the validity and finality of the decree and judgment pleaded as res adjudicata herein and upon the judicial declaration of the plaintiff as set forth in its answer in suit No. 69,984, as aforesaid, it decided to construct its railroad to the City of New Orleans, and establish its terminals there, provided it could secure by contract or ordinance from the City Council of the City of New Orleans, a right of way over the public belt tracks and reservation so as to reach the river front, as was contemplated by the City Council of the said City under Ordinance No. 1615 N. C. S. and as the Court decreed it had the right to do under said Ordinance.

Exceptor further avers that, with this end in view, it applied to the City Council of the City of New Orleans, and said Council passed Ordinance No. 1997 N. C. S. granting to your exceptor the right to enter the City of New Orleans and reach the river front by operating its cars over that part of the public belt already constructed and that part to be constructed by the New Orleans & San Francisco Railroad Company.

That in granting said right of way, the said City required your exceptor, in the event of the failure of the New Orleans and San Francisco Railroad Company, to build the public belt or such part thereof, to which a right of way had been or could be secured by the City of New Orleans, in accordance with Paragraph 2, Section 10, of Ordinance 1615 N. C. S.

That your exceptor was bound to build the same, it assuming under its ordinance and contract the obligation of the New Orleans & San Francisco Railroad Company, upon the failure of said Company to build the same.

37 That the said ordinance granting these rights to your exceptor, further provides that, upon its acceptance by the Louisiana Railway & Navigation Company, it should become a valid and binding contract between the City of New Orleans and said Company, all of which will appear by said Ordinance hereto attached and made part hereof.

Your exceptor further shows that it did accept the said Ordinance as it was required to do, by material act executed before Fred Zengel, then City Notary, on the 23d day of October, 1903, a certified copy of which act is hereto annexed and made part hereof, and the said New Orleans & San Francisco Railroad Company having failed to construct the said road within the time required in its Ordinance, and your exceptor having assumed the obligation of the said New Orleans & San Francisco Railroad Company to build the said belt railroad in lieu of the said Company, as provided for in Paragraph 2, Section 10 of said Ordinance, and acting upon the validity of said Ordinance and the validity and finality of the judgment of the Supreme Court of the State of Louisiana, which decreed that Paragraph 2, Section 10 of said Ordinance was valid and binding between the City of New Orleans and the New Orleans & San Francisco Railroad Company, and acting upon the judicial declaration of the City of New Orleans, in its answer to the suit of the Board of Commissioners of the Port of New Orleans vs. the New Orleans & San Francisco Railroad Company, in which it judicially asserted the validity of said Ordinance and upon its Ordinance granting a right of way over the belt tracks and reservation on the river front, and acting upon the certainty of the law in not permitting the City of New Orleans to assert the contrary in another judicial proceeding to the prejudice of your exceptor, it did, as rapidly as possible, construct its railroad to the City limits of the City of New Orleans; all of which was done with a view of carrying out its contract with the said City to construct the public belt tracks as aforesaid.

38 That when exceptor had completed its line to the protection levee of the City of New Orleans, it then purchased a right of way and built a track from its main line track near the protection levee and parallel with it to a point opposite that portion of the belt railroad which was already constructed, with a view of connecting with same and completing the said belt, as it was required to do under its ordinance and contract, and would have made said connection and completed said belt, but for the injunction herein sued out.

That the said work, performed upon the faith of the ordinance and the judicial decision and judicial declarations as above set forth, cost your exceptor large sums of money expended in the purchase of right of way, labor and material, all upon the faith of the judgment of the Supreme Court above referred to and the judicial declarations of the plaintiffs as aforesaid.

Your exceptor having acted upon the correctness and finality of

the judgment, as aforesaid, and the good faith of the City of New Orleans, when it, in its answer, asserted the validity of said Ordinance in defense of said suit, and as it is attempted in this suit to have declared invalid, illegal and ultra vires said ordinance, the validity of which plaintiff asserted in said suit, and especially that part thereof with reference to the construction of the public belt tracks, to-wit: Paragraph 2 Section 10 of said Ordinance, under which your exceptor was attempting to complete said public belt railroad, that the said City is now judicially estopped from making these contrary averments and assuming this inconsistent position, which estoppel your defendant specially pleads, and attaches hereto and makes part hereof the petition and answer in case No. 69,984, of the docket of the Civil District Court for the Parish of Orleans, as aforesaid.

39 Your exceptor further shows that the plaintiff herein is not only estopped by its judicial declarations, but that it is further estopped by its acceptance of the performance by exceptor of a part of exceptor's obligation under said contract, in this, to wit:

That, under the terms of Ordinance No. 1997 N. C. S. which is a contract between the City of New Orleans and the Louisiana Railway & Navigation Company as aforesaid, and under Section 11 of said contract, your exceptor was required to "begin construction work within the City of New Orleans within six months from its acceptance of this ordinance." Section 12 provides that "said Company shall, at its own expense, fill with suitable material the old Poydras Drainage Canal or City ditch from Rocheblave street to Carrollton Avenue."

That your exceptor did begin construction work within six months in the City of New Orleans, and has built its railroad for several miles in said City, and it did fill or cause to be filled the Poydras ditch, all at a great cost and expense to your exceptor, aggregating the sum of over seventy-five thousand dollars for filling the ditch alone, and largely in excess of that sum in constructing its railroad in the City of New Orleans as it was required to do under said ordinance.

That said performance of said contract obligations was done with the full knowledge, consent and acquiescence of the Mayor and Council of the City of New Orleans. That said work had greatly benefitted the City of New Orleans, and the plaintiff is now estopped from claiming the invalidity of the said ordinance, which has been faithfully performed by your exceptor herein, as aforesaid, which further plea of estoppel your exceptor especially pleads.

Wherefore, defendant prays that the pleas of res adjudicata and estoppel herein filed be maintained at the cost of the plaintiff.

40 Reserving the benefit of the foregoing exceptions and pleas and insisting that all of same be passed upon in the order in which they are pleaded and before passing upon the merits and reiterating and reaffirming same as a part of the answer herein in the event they are overruled, for further answer to the demand of the plaintiff, your defendant denies each and every allegation therein contained except what is herein admitted.

Your defendant shows that it began to construct a railroad in the City of Shreveport, down the valley of the Red river; that when it had constructed said railroad in the direction of New Orleans for some distance, your defendant had in mind the reaching of deep water at some point on the Gulf Coast, or making a connection with the Mississippi River at or near Natchez, Miss. The City of New Orleans was desirous of securing said road and in order to induce your defendant to bring said road to said City and establish its terminal here, the President of said Company was approached by representatives of the commercial bodies of said City and urged to build the said road to the City of New Orleans, giving your defendant, through its president, the assurance that it would be treated liberally with reference to franchises and rights of way over and across the public streets of New Orleans, and that it would be afforded a right of way in order that it might reach the river front with its own engines and cars. That in pursuance of this assurance and relying on the decision of the Court in the Capdevielle case and on its answer in the Dock Board case your defendant decided to run its railroad to the City of New Orleans and with this end in view, placed in the City of New Orleans a representative who purchased for your defendant certain properties in said City for the purpose of freight and passenger depots, and for other purposes, and also purchased certain property upon the river front to be used as its river terminals, with the assurances aforesaid that it would be granted a right of way over which it could reach its said river terminals over its own tracks, or at least with its own equipment.

It then applied to the City Council of the City of New Orleans for a right of way over, along and across certain streets in the City of New Orleans, and also for a right of way over the public belt railroad already constructed and that part then in contemplation of being built by the New Orleans & San Francisco Railroad Company upon the terms and conditions of its paying a certain amount of money, which amount was to be paid for its right to run its engine and cars over the public belt railroad for a certain distance and in the event that the New Orleans & San Francisco Railroad Company constructed only a part of said public belt, then it was to have the right of way over that part thus constructed by paying a sum proportionate to the total amount it would have paid for the use of the entire public belt to a certain point.

With this end in view, that is that the New Orleans and San Francisco Railroad Company would build the entire belt, or at least a part thereof, said right of way and franchise was granted your defendant as will appear by Ordinance No. 1997 N. C. S. which is attached hereto and made part hereof, as aforesaid.

Defendant avers that when said Ordinance was being considered by the City Council of the City of New Orleans, it was also considered by all the Exchanges and commercial bodies of said City and as passed had the sympathy and support of all of said Exchanges and commercial bodies, as well as all the leading newspapers of said City, they all being citizens and taxpayers of the City of New Orleans and appreciating the great advantage that would be derived by

the said city from the passage and execution of said Ordinance.

42 Your defendant further avers that the City Council of the City of New Orleans as well as the great majority of its citizens being particularly anxious that the public belt railroad be constructed and fearing that the New Orleans & San Francisco Railroad Company might not build the belt or any part thereof, your defendant was required to construct the same in lieu of the New Orleans & San Francisco Railroad Company, assuming all the obligations of said Company and succeeding to all the rights of said Company under its Ordinance with this exception, viz:

That immediately upon the completion of the said public belt railroad by your defendant it was to be turned over to the absolute ownership and control of the public belt authorities, and your defendant being granted the right to operate its cars over said public belt road under the control and management of the public belt authorities.

Your defendant was also granted the right of way from these public belt tracks to its terminals on the river front. This Ordinance of the City of New Orleans granting certain rights and franchises to your defendant and imposing certain obligations upon it, was required to be accepted by your defendant by notarial act before the City Notary, and after its acceptance it was to be a valid and binding contract between your defendant and the City of New Orleans.

Your defendant avers that it did accept said Ordinance in the manner and in the time prescribed therein, as per act before Fred Zengel, City Notary, hereto annexed as aforesaid, and that the said Ordinance is therefore a valid and binding contract between the City of New Orleans and your defendant. That your defendant has faithfully performed all the obligations imposed on it by said Ordinance and contract so far as it was not interfered with by plaintiff, and would have completed that part of the belt it was required to build long before this time, had it not been prevented from doing so by the injunction herein issued.

43 Your defendant further shows that at the time of the passage of Ordinance No. 1615 N. C. S. and at the time of the adoption of the Ordinance No. 1997 N. C. S. it was in contemplation of the parties that the City might not be able to furnish a complete right of way for a complete belt, in which event it was contemplated that such portion of the public belt railroad should be constructed under said Ordinance as the New Orleans & San Francisco Railroad Company or your defendant, its successors to said rights and obligations should be able to construct over property to which the City had secured a right of way. That while Ordinance No. 1615 N. C. S. was not framed in such a manner as to be within the provisions of Ordinance No. 147 N. C. S. passed by the City Council and approved by the Board of Commissioners of the Port of New Orleans, as held by the Honorable Supreme Court of Louisiana, yet Ordinance No. 1997 N. C. S. has a proviso therein which declares that the public belt road as soon as completed shall

be turned over to the full ownership, possession and control of the public belt authorities, and that this provision brings the Ordinance within the terms of Ordinance No. 147 as above referred to, and that said resolution of the said Port Commission is the authority for your defendant to construct the public belt railroad along the river front and over the property under the control of the Board of Port Commissioners. Said Ordinance No. 147 N. C. S. and the resolution of the Port Commission above referred to are hereto attached and made part hereof, marked Exhibit "1."

Your defendant further shows in the alternative in the event that your Honorable Court holds that your defendant did not have the right or authority under said Ordinance No. 147 N. C. S. and said resolution as aforesaid to construct the said tracks over property under the control of the Port Commissioners as aforesaid, nevertheless

44 a complete right of way over the belt road so far as then completed from the upper City limits to its terminus and from that point over the incompleted belt reservation to Toledano Street or to the point where it infringes upon the property under control of the Port Commission; and over this part of the river front your defendant had the unquestioned right under said Ordinance and the decision of the Honorable District and Supreme Courts in the case of Paul Capdevielle, Mayor of the City of New Orleans vs. New Orleans & San Francisco Railroad Company; as aforesaid, to construct said tracks between said points on said river front and it cannot now be prevented from doing so by injunction.

Your defendant further shows with reference to Ordinance No. 2683 N. C. S. which is amendatory to Ordinance No. 147 N. C. S. and is pleaded by plaintiff in support of its cause of action herein, that said ordinance was passed after Ordinance No. 1997 N. C. S. was accepted by your defendant and after same had become a valid and binding contract between respondent and the City of New Orleans, and that any resolution or ordinance of said Council passed subsequently cannot effect the rights of your defendant; and if the Court attempts to attach weight to same or in any manner to construe the same so as to affect the right of your defendant, then it is giving effect to a law which impairs the obligation of the contract of your defendant, it attempts to divest vested rights and is in violation of Articles 2 and 166 of the Constitution of the State of Louisiana and of Section 10, Article 1 of the Constitution of the United States. Your defendant now especially pleads the unconstitutionality of said Ordinance and such interpretation as being repugnant to Articles 2 and 166 of the Constitution of the State of Louisiana and especially of Section 10 Article 1 of the Constitution of the United States.

45 For further answer your defendant denies that it has in any manner violated any of the terms of its contract with the City of New Orleans, but that it has faithfully performed all the duties incumbent and obligations imposed upon it, in so far as the City of New Orleans permitted it to do. That with reference to the deposit of \$50,000.00 of securities, as required by said Ordinance,

your defendant says that after litigation arose as to the validity of the Frisco Ordinance, to-wit March 3, 1903, there was a resolution passed by the City Council of the City of New Orleans extending the time limit for the performance of all ordinances with reference to construction of the belt railroad so that same should not begin to run until after the final decision of the litigation which arose concerning the validity of said Ordinance No. 1615 N. C. S. That this resolution was construed by your defendant, its attorneys and the City authorities to extend the time in which the \$50,000.00 in securities under said Ordinance was to be deposited with the fiscal agent of the City, and that said deposit was made within the delays allowed after the termination of said litigation. If, however, it could be contended that your defendant could not take advantage of the resolution above referred to, it shows that it acted in good faith and upon the interpretation put upon said resolution by all parties in interest. That it did make the deposit of \$50,000.00 in securities as required by said Ordinance, and the same were accepted by the fiscal agent of the City of New Orleans, under said Ordinance and contract. That the Mayor and other City authorities were notified at the time of said deposit and its acceptance, and they acquiesced in same. That said deposit is still held by said City, and the said City being in possession of said deposit and holding the same under said contract without objection or protest is estopped from asserting that same was not deposited within the time required by said ordinance, or that the failure to deposit the same within the time originally stipulated is a violation of said Ordinance.

46 Your defendant further shows that the plaintiff herein through its agent, has taken advantage of the issuance of the injunction herein and has completed that portion of the belt tracks which was to have been completed by your defendant. That if it is held that your defendant is authorized under said Ordinance to construct said public belt tracks, then that the construction of the same by the plaintiff, during the pendency of this suit, cannot affect its rights in the premises, but if your Honorable Court should hold that the construction of the public belt was a great public necessity and that the City was authorized to construct the same even though the construction of same was protected by the injunction issued against your defendant, then your Honorable Court in that contingency should construe the contract between the parties as though the public belt tracks had been constructed through the agent of the City of New Orleans, the New Orleans & San Francisco Railroad Company and that your defendant should have the same right and authority to use said public belt tracks to Henderson street, and to connect same with its terminals on the river front, as though said public belt tracks had been completed by the New Orleans & San Francisco Railroad Company, upon your defendant complying with the terms of the said Ordinance No. 1997 N. C. S. in the payment of the sum therein named.

If, however, the Court should hold that as the New Orleans & San Francisco Railroad Company did not build the public belt tracks as it was required to do under its ordinance, and consequently the right

to use the tracks as though they had been built by the New Orleans & San Francisco Railroad Company does not exist in your defendant, then your defendant shows that under the circumstances of the said plaintiff taking advantage of the writ of injunction herein and having constructed the said public belt tracks, the situation should be treated as though the public belt tracks had been
47 constructed through the public belt authorities of the City of New Orleans, as the agents of your defendant, and that it should have the same right and authority to use the said public belt tracks to Henderson Street and to connect same with its terminals on the river front as though the said Public Belt Railroad has been completed by it under its contract and ordinance No. 1997 N. C. S., upon your defendant paying to the City of New Orleans what the construction of said belt tracks from the end of the tracks already constructed to the point that they are to be used by your defendant reasonable cost.

It shows that the injunction herein sued out is illegal, oppressive and unwarranted and should be dissolved and set aside by judgment of your Honorable Court.

Your defendant, as plaintiff in reconvention, further shows that it has been damaged by the illegal issuance of said injunction in the full sum of Twenty-five thousand (\$25,000.00) dollars, to-wit: in being forced to employ counsel to defend this suit in the sum of \$5,000.00, and in loss of time and delays in constructing the work contemplated by said Ordinance and in operating its trains, in the sum of \$20,000.00.

Wherefore the premises considered, your defendant prays that the injunction herein sued out be dissolved; that the demand of the plaintiff be rejected at its cost; that the Ordinance No. 1997 N. C. S. be decreed a valid and existing contract between the plaintiff and your defendant and that it be authorized to comply with the terms of said contract by constructing the public belt railroad as therein contemplated and that its rights of way over that portion of the belt completed at the time that the said Ordinance was passed and its right of way from the public belt railroad to its property, the Willowgrove Landing, on the river front be also recognized and enforced.

48 In the alternative, if the Court should hold that, the public belt railroad having been constructed by the City pending this suit, the same cannot be removed and that your defendant cannot therefore construct the same, then your defendant prays in the alternative that the right of way granted it over the public belt that was completed at the time of the adoption of the Ordinance and its right of way over that part of the public belt that was to be completed by the City, through its agent the New Orleans & San Francisco Railroad Company, be recognized as a valid and existing right over the belt railroad as now constructed by the City, and that the said City be required to permit your defendant to run its engines, cars and equipments over said public belt road in the same manner, to the same extent and under the same terms and conditions, as though said public belt railroad had been completed under the terms

of the Ordinance No. 1615 N. C. S., upon defendant complying with the terms of payment as provided in Ordinance No. 1997 N. C. S.

Further in the alternative, if the Court should hold that defendant's right under its ordinance in the event of the construction of the said public belt railroad by the New Orleans & San Francisco Railroad Company ceased upon the failure of the said Frisco Railroad Company to construct said public belt railroad then it further prays in the alternative that the right of way granted it in its Ordinance over the Public Belt road that was then constructed and that was afterwards to be constructed either by the New Orleans & San Francisco Railroad Company or by your defendant be recognized as a valid and existing right over the public belt railroad as now constructed by the City, and that it be decreed that the said City constructed said public belt railroad or that portion thereof that was to have been constructed by your defendant *as* the agents of your

defendant and that the said City be required to permit your
49 defendant to run its engines, cars and equipment over said public belt railroad in the same manner, to the same extent and under the same terms and conditions as though the said public belt railroad had been completed by your defendant under the terms of Section 10, Paragraph 2 of Ordinance No. 1615 N. C. S. and Ordinance No. 1997 N. C. S. upon the defendant paying to the City of New Orleans what it reasonably cost to construct that portion of the said railroad from the end of the public belt tracks already completed at the time of the adoption of said Ordinance No. 1997 N. C. S. to Henderson Street or to a point where it infringes upon the property of the Port Commission if the Court should hold that this is the limit of the authority of the City of New Orleans in granting a right of way over the said public belt railroad and reservation on the river front.

It further prays that the injunction herein sued out be dissolved and that there be judgment in reconvention in favor of respondent and against plaintiff for the full sum of \$25,000.00 for the damages sustained by it on account of the illegal issuance of said injunction.

It further prays in the alternative, if the Ordinance and contract should be annulled as prayed for by the plaintiff, that defendant be reserved the right to institute an action for the purpose of recovering from plaintiff the amount expended by it in partially performing the contract, as set out in this petition.

It further prays for such other further remedy and relief as the case may require and law and equity permit.

(Signed)

FOSTER, MILLING & GODCHAUX,
ALEXIS BRIAN,
WISE, RANDOLPH & RENDALL,
Attorneys for Def't.

50

Motion Fixing Exception.

Filed October 20, 1908.

Civil District Court, Parish of Orleans, Division "C."

No. 79743.

MARTIN BEHRMAN, Mayor, et als.
versus
LOUISIANA RAILWAY & NAVIGATION COMPANY.

On motion of Wise, Randolph & Rendall and Foster, Milling & Godechaux and Alexis Brian, Attorneys for defendant herein, and on suggesting to the Court that defendant has filed exceptions herein on the 8th day of October, 1908, and that the same should be fixed for trial:

It is ordered by the Court that the said exceptions be fixed for trial on the 30th day of October 1908, at 11 O'clock A. M.

Service accepted.
(Signed)

SAM'L L. GILMORE, *City Att'y,*
Attorney for Plaintiff.

Exception Overruled.

Extracts from the Minutes of Division "C," Friday, November 27th, 1908.

Present: The Honorable John St. Paul, Judge.

The Exception in this case came up for hearing on this day.
Present: Sam'l L. Gilmore, Esq., City Att'y, Attorney for Plaintiff, and Messrs. Foster, Milling & Godechaux, Attorneys for Defendant.

And after hearing pleadings & argument of Counsel the Court being of opinion that this is a suit by the City of New Orleans, and not by the Belt Rail Road Commission, which is without corporate capacity, and the Mayor has the right to stand in Judgment for said City.

It is Ordered that the Def't's Exception of "Want of Capacity" be overruled.

50a

Division "C," Civil District Court.

No. 79743.

MARTIN BEHRMAN, Mayor, et al.

vs.

LOUISIANA RAILWAY & NAVIGATION CO.

Testimony on Behalf of Plaintiff.

Filed April 19th, 1909. (Sg.) Jose Garidel, D'y Cl'k.

51

Division "C," Civil District Court.

No. 79743.

MARTIN BEHRMAN, Mayor, et als.

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

Testimony and Notes of Evidence, Taken in Open Court on March 24th, March 25th, and April 1st, 1909, Before the Hon. John St. Paul, Judge, by A. E. Oliveira, Stenographer, on Behalf of Plaintiffs.

Appearances:

For Plaintiffs: Sam'l L. Gilmore, Esqr., of Counsel. R. G. Dupre, esqr., Ass't City Attorney.

For Defendants: Mr. Milling, of Foster Milling & Godchaux and Mr. Randolph, of Weis, Randolph & Rendall.

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52 By Mr. GILMORE: Counsel for the Mayor offers, produces and asks to be filed in evidence a duly certified copy of Ordinance No. 15080, Council Series, marked A1.

Also offers in evidence a duly certified copy of Ordinance No. 1615 New Council Series, being an Ordinance granting right of way and depot and other rights and privileges to the New Orleans & San Francisco Railroad Company, marked A2.

Also offers in evidence a duly certified copy of a resolution adopted by the Council of the City of New Orleans, on September 11th, 1900, No. 244 New Council Series, and marked A3.

Also offers in evidence Ordinance No. 147 New Council Series, a duly certified copy thereof being an ordinance establishing a Public Belt Rail-Road system in and for New Orleans, marked A4.

Also offers in evidence a duly certified copy of City Ordinance No. 1997 New Council Series, being an ordinance granting rights of way and depot and other rights and privileges to the Louisiana Rail-Way and Navigation Company, Marked A5.

Counsel for the Mayor next offers, produces and asks to be filed in evidence a duly certified copy of Ordinance No. 2683 New Council Series, being an Ordinance amending and re-enacting Sections 1, 2, and 4, and repealing Sections 3, 5, 8, 9, and 11, of Ordinance No. 147 New Council Series, adopted August 7th, 1900; adding to said ordinance as new sections a section to be numbered 3 and a section to be numbered 11; and renumbering Sections 10 of said

53 Ordinance, to be known as Section 8. This document is marked A6.

By Mr. MILLING: We object to the last offering for the reason that it is a resolution or ordinance passed by the City Council after the ordinance 1997 had been passed and accepted by the defendant, and therefore, any ordinance passed by the City of New Orleans, after the adoption of Ordinance No. 1997, and its acceptance by the defendant, and which in any manner attempts to affect the rights of the parties is in violation of the Constitution of both the State of Louisiana and the United States and cannot be considered by the Court in determining the rights of the parties under the original ordinance.

By the COURT: Let the objection go to the effect and not to the admissibility of the document.

By Mr. MILLING: To which ruling of the Court we reserve a bill of exceptions.

By Mr. GILMORE: Counsel for the Mayor offers, produces and asks to be filed in evidence a duly certified copy of Ordinance No. 3556, New Council Series, being an ordinance providing for credits with certain banks of the City of New Orleans, not to exceed in the aggregate the sum of \$100,000.00, said credits to bear interest at the rate of 5% per annum, and obligating the City of New Orleans to refund whatever amounts may be advanced by said Banks, together
54 with interest thereon; which document is marked A7.

By Mr. MILLING: In addition to the objection already made with reference to the ordinance No. 2683, we object on the ground that this document is irrelevant and immaterial, as to where the Belt Road or the City secured the money with which to pay for the Belt Road.

By the COURT: It is a part of the general history of the case; it might as well go in and the objection is over-ruled.

By Mr. MILLING: We reserve a bill of exceptions.

By Mr. GILMORE: Counsel for the Mayor offers, produces and files in evidence a duly certified copy of Ordinance No. 4230 New Council Series, being an ordinance binding and obligating the City of New Orleans to make appropriations to the aggregate amount of \$225,000.00, and interest in the Budget of the year- 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915 and 1916, for Public Belt Railroad purposes, etc.; marked A8.

By Mr. MILLING: Same objection.

By the COURT: The Court makes the same ruling.

By Mr. GILMORE: Counsel for the Mayor offers in evidence a duly certified copy of a resolution of the Board of Commissioners of the Port of New Orleans, adopted at a meeting held August 12th, 1902, marked A9. Counsel for the Mayor also offers in evidence a
55 certified copy of a resolution adopted by the Board of Commissioners of the Port of New Orleans, at a meeting held January 17th, 1905, and marked A10.

By Mr. MILLING: To these resolutions we interpose the same objections that we urged to the introduction of Ordinance No. 2683.

By Mr. GILMORE: Counsel for the Mayor also offers in evidence a duly certified copy of a resolution adopted by the Board of Commissioners of the Orleans Levee District, dated June 17th, 1905, and marked A11.

By Mr. MILLING: Objected to as irrelevant.

By the COURT: The objection is over-ruled.

By Mr. GILMORE: Counsel for the Mayor offers, produces and asks to be filed in evidence a duly certified copy of a resolution adopted by the Board of Commissioners of the Orleans Levee District, on the 31st day of March, 1906, and marked A12.

By Mr. MILLING: Same objection.

By the COURT: The objection is over-ruled on the ground of irrelevancy.

By Mr. GILMORE: Counsel for the Mayor offers in evidence the

original letter of Henry M. Young, Trust Officer of the Interstate Trust & Banking Company, dated New Orleans, November 10th, 1905, addressed to the Mayor stating: "There have been deposited with us this day for account of the Louisiana Railway & Navigation Company, fifty State of Louisiana 4% Bonds for \$1,000.00 each, exceeding in value \$50,000.00 to be held in escrow, subject to the terms and conditions of paragraph "C" of Section 3 of Ordinance 1997, N. C. S., approved by the Mayor September 4th, 1903." This document is marked A13.

56 By Mr. MILLING: Mr. Gilmore, in connection with this offer I suppose you will admit that that deposit is still in existence?

By Mr. GILMORE: I don't know it; but if you will state it as a fact I certainly will admit it.

ADMISSION.—It is admitted that the Interstate Bank & Trust Company was the fiscal agent of the City of New Orleans.

HAMPTON REYNOLDS, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. GILMORE:

Q. Mr. Reynolds, what is your profession?

A. Civil engineer.

Q. Were you employed in any official capacity during the year 1906?

A. Yes sir.

Q. In what capacity, Mr. Reynolds?

A. Assistant Engineer of the Public Belt Railroad.

Q. Who was the Chief Engineer, Mr. Reynolds?

A. The City Engineer, Captain Hardee.

Q. Who had active charge of the conduct of the Engineering Department of the Public Belt Railroad?

A. I did.

Q. How long had you been in office Mr. Reynolds prior to June 26th, 1906?

A. About a year and a half; I went to work in January, 1905.

Q. You had charge, active charge, of the Engineering Department of the Public Belt Railroad Commission of the City of New Orleans?

57 A. Yes sir.

Q. About the date when this suit was filed on June 26th, 1906?

A. Yes, sir.

Q. Do you remember being present when an effort was made by the defendants in this case to lay the railroad tracks on the river front, at a point near the Protection Levee?

A. Yes, sir

Q. Please state what occurred and what the situation was?

A. There had been some negotiations between the officials of the Louisiana Railway & Navigation Company and the Public Belt

Commission relative to the right of the Louisiana Railway & Navigation Company to build tracks on the Public Belt Railroad Reservation and to operate them.

Q. In that connection do you remember what those negotiations were, or were there any conferences, and if so, where did they occur and what transpired?

A. Yes sir, *they* were several conferences; one particularly I recollect took place at the City Hall in the Mayor's parlor.

Q. In the presence of the Mayor?

A. Yes sir, and our now Governor, Governor Sanders.

By Mr. MILLING: We object to any statements or declarations or conversations had between plaintiff and defendant with reference to compromising this law suit; if that is the object of counsel—

By Mr. GILMORE: That is not the object.

By Mr. MILLING: We invoke the rule that anything said or done in reference to the compromise of a law suit is not admissible in evidence.

By Mr. GILMORE: The object is that this suit was filed in 58 1906, lay inactive on the docket until 1909, and this evidence is offered to show that between the time that this suit was filed or just immediately preceding it there were no negotiations between the City of New Orleans and this defendant in regard to this matter, and if there be any complaint of the fact of the injunction outstanding, it is due to the fact that the defendants did not take the matter up sooner, and all of the work on this Public Belt Road that has been done since 1906 was done practically with the acquiescence of the defendants.

By Mr. MILLING: If that is the object I will state to the Court that that is not an issue in this case. He has not set up or pleaded any acquiescence, and there is nothing in the pleadings to indicate that he relies upon any acquiescence on the part of the defendant Company.

He has laid great stress, your Honor, on the fact that this suit was filed in 1906, and the answer only in 1908. We have stated to the Court that we can explain that and we propose to do so; but, in offering this for the purpose of showing an acquiescence is beyond any issue in the case.

By the COURT: I will hear the evidence before I rule.

By Mr. MILLING: I reserve a bill of exceptions.

By Mr. GILMORE:

Q. Mr. Reynolds, I understood you to state that there was prior to the filing of this suit, a conference held in the Mayor's parlor, which had been attended by the officers of the City Government, including the Mayor, and the representatives of the Louisiana Railway & Navigation Company?

59 A. Yes sir.

Q. At which you were present?

A. Yes sir.

Q. Mr. Reynolds did that result in any conclusion or settlement?

A. No sir, I believe not.

Q. What then, Mr. Reynolds, occurred after this conference?

A. There were propositions made and counter propositions, and one proposition made by the Public Belt Commission to the Louisiana Railway & Navigation Company.

Q. State what facts occurred?

A. After that the river front was patrolled, anticipating that possibly the Louisiana Railway & Navigation Company might undertake to lay tracks which I believe the City of New Orleans considered they had no legal right to do.

Q. What authority was in possession of the Public Belt reservation from the Parish line down?

By Mr. MILLING: Objected to as a matter of opinion.

By Mr. GILMORE:

Q. Mr. Reynolds, as a fact who was in physical possession?

A. The Belt Railroad Commission.

Q. Then what occurred?

A. Then the Louisiana Railway & Navigation Company, I think, notified the Mayor that they proposed to lay some tracks on the river front; I am pretty sure they did.

Q. What did they propose to do Mr. Reynolds?

A. They proposed to lay the track.

By Mr. MILLING: Objected to on the ground that the letter is the best evidence.

By Mr. GILMORE: No sir, his testimony is the best evidence.

By the COURT: Was there a letter Mr. Reynolds?

60 A. I was so informed, Judge.

By Mr. GILMORE: He does not know anything about the letter but he knows what happened. Just go on and state what happened, Mr. Reynolds?

A. The Louisiana Railway & Navigation Company had a force of men on Leake Avenue about the upper part of the line of Audubon Park; they had about ten or twelve men and a foreman. This was about the middle of May, 1906; they had about ten or twelve rails, and I suppose something in the neighborhood of sixty or one hundred ties that they had hauled up there the evening before, and the next morning about seven o'clock they started in with the foreman and ten or twelve men to lay the track on Leake Avenue and the river on half of the neutral ground, to lay a track connection or rather beginning right where the old track belonging to the Belt Road ended. They started to lay that track on down stream, and the police officers who were there ordered them to stop. The foreman said he had his orders to lay the track; and the police officers threatened to arrest the foreman; and the men left, but I believe the foreman was taken to jail that morning.

Q. Was any attempt made to connect the upper end of the Belt track at the Protection Levee?

A. Not that I know of.

Q. This all happened prior to the institution of this suit?

A. Yes sir.

By the COURT:

Q. What is the difference between your answer given a moment ago and the answer you gave Mr. Gilmore about connections?

61 A. One was at Audubon Park and the other was at the Protection Levee.

By Mr. GILMORE:

Q. After that occurrence did they make any further attempt to lay tracks on any part of the Public Belt reservation?

A. No, sir, not to my knowledge.

Q. What did the Public Belt authorities do?

A. It had cleared up a good part of the roadway.

Q. Was the Public Belt doing any work such as grading on the upper part of Audubon Park?

A. We were grading between Audubon Park and State Street as near as I can recollect.

Q. After this suit was filed what did the Public Belt Commission do in regard to the construction of the Public Belt Railroad System?

A. They continued with their daily work with a force, and subsequently let a contract for the construction of a part of the system, that is, one main line from the upper property line of Audubon Park to about Montegut Street; and as soon as this contract was let they proceeded with the construction and finished it.

Q. Did the Public Belt commission proceed with the construction of the public Belt system from the upper Parish line to the last point at Montegut Street, continuously after this suit was filed?

A. Yes, sir, we were working all along the line.

Q. What is the physical condition as to the construction of the Public Railroad to-day?

A. I think on the river front the most essential part of the Public Belt Railroad has been completed; there are a few sections where the main line has not as yet been doubled, but there is one continuous track from the Protection Levee to Louisa Street; and for the best part of the entire section there is a double track.

Q. Is there a double track on the river front between Henderson Street and the upper Parish line?

A. Yes sir, and I do not think there is a gap in it.

Q. Is there a double track built on the outside of the neutral ground of Leake Avenue between Henderson Street and the upper Parish line?

A. There is a double track of the Public Belt on Leake Avenue from the upper Parish line to Peniston or Amelia Streets, and then the tracks continue to be double to Water and Toledano; and down to Tchoupitoulas, it is double down to Third Street and has been continued some distance from there, I don't know for how long a distance. There are two or three places where there is only a single

track; I suppose there are three or four squares in length in different spots. There is one single track all of the way from Barracks Street to Louisa Street; it is double from Barracks Street to Calliope, and then there is a short stretch of single track a thousand feet long between Calliope and Terpsichore, and then there is a double track from Terpsichore I think up to St. Mary.

Q. But all of the territory embraced in this suit between Henderson Street and the upper protection levee is actively occupied with the constructed track of the Public Belt system?

A. There might be a small space at St. Mary Street on account of that cave, that is not.

Q. But that will eventually be restored?

63 A. Yes sir.

Q. Has the Public Belt a complete public belt railroad system for the service of the wharves and river front from the upper Parish line to Montegut street, a single and double track?

A. Well, it is complete in so far as it is possible to serve under existing conditions.

Q. It is perfect?

A. No sir, it is not perfect, but as far as it is practicable, possibly that system has been completed.

Q. The system has been completed in so far as it will be necessary to meet changed conditions?

A. Yes sir.

Q. Do you include in the new conditions an enlargement of the new wharves and sheds and widening of the levee that these public works would necessitate for construction work?

A. Yes sir.

Q. Has the Public Belt Railroad system any connection with any of the public wharves?

A. Yes sir, with you might say all of them.

Q. Can you state what connection the Public Belt Railroad has with the wharves administered by the Dock Board?

A. The Belt serves the public wharves just below Stuyvesant docks, where the existing improved facilities of the dock board begin; they serve the Harmony street wharf with two tracks; they serve the Seventh Street wharf with one track; they serve those wharves I might say exclusively because their tracks are immediately next to the Dock Board sheds and roadways, they serve from Third Street on the public wharves on down to about St. James Street, some with one track and some with two tracks.

64 Q. Do you know what lines of steamers are now moored at the public wharves and which are served by the Public Belt Railroad system?

A. Yes, the Head Line is usually served at Harmony Street wharf, and the Texas Transport & Terminal Company have vessels that land there, and the Creole Line also, and at the Celeste Street shed the Leyland Line have their vessels, and various vessels land between Third and Celeste Streets.

Q. Do the principal lines of trans-Atlantic steamers come to the wharves served by the Public Belt?

A. Yes, sir.

Q. Is the Public Belt Railroad in operation?

A. Yes sir, in actual operation, between the upper Parish line and at present to Louisa Street; they did at one time operate down as far as Kentucky Street, covering the entire commercial front.

Q. Where were the funds drawn from for the payment of all of the work that was done on this Public Belt road?

A. From the City of New Orleans.

Q. The defendant Company did not contribute anything to that work at all did it?

A. No sir.

Q. Did you ever see or hear of any attempt on the part of these defendants to interfere with the construction of this Belt Railroad from the time when this suit was filed?

By Mr. MILLING: We object on the ground that there was an injunction issued out of this Court restraining the defendants from interfering with the plaintiffs or from in any manner attempting to construct a belt railroad themselves.

65 By the COURT: The objection goes to the effect.

By Mr. MILLING: We reserve a bill of exceptions.

By Mr. GILMORE:

Q. Does the Public Belt system of the City of New Orleans serve the Louisiana Railway & Navigation Company?

A. Yes sir.

By Mr. MILLING: We had that distinct agreement at the time.

By Mr. GILMORE: I have not got the agreement here; it is not offered to show that there has been a settlement of the controversy; but the agreement was made without prejudice to this suit. We want the Court to be advised of the fact that no harm has ever been done to the defendants by the City of New Orleans in this matter and that no harm can ever result to them; and as a physical fact the service has been instituted which meets the situation.

By Mr. RANDOLPH: The objection we make is that the demand for damages here on the part of the defendant is for damages for dissolving the injunction: and if our position is correct here in Court we are entitled to a reasonable fee for the dissolution of the injunction. It makes no difference what transpired in the interval; if our position taken by us in our answer be correct we are entitled to a judgment for attorney's fees and any other damages that we might prove. We respectfully submit that if counsel wants to offer this testimony by way of reply to any claim that we may make for damages, it might commend itself to the Court. I think the

66 Court should for the present reject this testimony, reserving the right to counsel *in* reply to our reconventional demand.

By Mr. MILLING: We have a written agreement in this matter. The agreement was that the Court should not know that we were on the Belt tracks at all.

NOTE.—Argument by Mr. Milling.

By Mr. GILMORE: I will withdraw the question for the present

until we have the agreement here; I am certain that the agreement does not say that the Court should not know that the defendants were on the Belt tracks.

Cross-examination by Mr. MILLING:

Q. Mr. Reynolds how long was the track that was completed by the Illinois Central Railroad, the Belt Railroad track—how long was that? How many yards or feet?

A. On Leake Avenue you mean?

Q. Yes sir?

A. About ten thousand feet long.

Q. And extended from where to where?

A. From the upper property line of Audubon Park to the upper Parish line of the Parish of Orleans.

Q. How near to the Protection levee did it extend, Mr. Reynolds?

A. About within one hundred feet.

Q. How far is it across from there to the end of the track of the Louisiana Railway & Navigation Company, if you know?

A. They are joined now, if I understand it.

Q. Strike that out Mr. Stenographer—I mean at the time this suit was instituted?

A. I never measured it and I really don't know it; but I
67 presume that the track that was there or was said to have been there connecting the Louisiana Railway & Navigation Company, above the protection levee was I suppose a matter of eight or nine hundred feet; I would guess at that but I really don't know.

Q. Now, how far was it from the end of these tracks built by the Illinois Central on Leake Avenue going down the river to Audubon Park?

A. That went to Audubon Park to the upper property line of Audubon Park.

By the COURT:

Q. Where is it that the Louisiana Railway & Navigation Company attempted to lay those ten or twelve rails and sixty odd ties?

A. They attempted to lay from the upper line of Audubon Park, down stream, from the upper line of Audubon Park, a distance of ten thousand feet. The Illinois Central laid for the City of New Orleans two tracks on the river half of the neutral ground extending from the upper line of Audubon Park to within one hundred feet of Protection levee.

By Mr. MILLING:

Q. Were those tracks there on the 1st of January, 1903?

A. I really don't know; I was not employed by the Belt railroad then.

Q. You don't know then when they were built?

A. No, sir, I do not.

Q. How far is it from the upper property line of Audubon Park down to Henderson Street?

A. From the upper line of Audubon Park to Henderson Street

is about, let's see (witness calculates) about between twenty seven and twenty eight thousand feet.

68 Q. From Audubon Park to Henderson Street is about twenty eight thousand feet?

A. Yes sir.

Q. And how far is it down to Toledano Street?

A. Toledano Street is about (witness calculates) about seventeen thousand, four hundred feet, somewhere in that neighborhood.

Q. What is a reasonable cost for constructing the Belt Railroad from the upper line of Audubon Park to Henderson Street?

A. That would depend upon the sort of construction you wanted to put in.

Q. Well, the kind that you did put in, Mr. Reynolds?

A. I don't know; I would have to look at the record to see.

Q. You were the engineer in charge of this work?

A. Yes sir.

Q. Can you ascertain that fact for us?

A. I probably could do that very closely by looking at the record, but I do not remember them off hand.

Q. Will you get us up the figures and present them to us before we close the case?

A. Yes sir.

Q. I also want the cost of the road down to Toledano Street; you might give it to Toledano Street and then to Henderson Street?

A. You must understand that these are records that are in the Public Belt Commission's office that I would not have access to not being employed by them unless I get permission.

Q. Who is the present engineer of the Belt Railroad?

A. Mr. Bartley.

69 Q. Now, you say that the police officers arrested the foreman of the Louisiana Railway & Navigation Company when they attempted to lay these tracks?

A. I think they did, yes.

Q. Well, he was arrested. Do you know what disposition was made of that case?

A. I really don't know; I think they were taken to the Recorder's Court.

By Mr. MILLING: It is a fact that he was discharged, isn't it, Mr. Gilmore?

By Mr. GILMORE: I don't know if he was tried; the record would be the best evidence of that Mr. Milling.

By Mr. MILLING: A man who was present when another man was tried and acquitted is about I think as good evidence as the record.

By the COURT: It strikes me that it is irrelevant, but I have nothing to rule on.

By Mr. GILMORE: The fact is that there was no prosecution.

By the COURT: If it becomes so material it must be proven by the best evidence and that is the record.

By Mr. MILLING:

Q. Mr. Reynolds, what kind of yard facilities has the Public Belt Railroad for braking cars and switching them?

A. What do you mean?

Q. Well, have they any yards at all?

A. Yes, they have.

Q. What have they?

A. They have a yard at Lafayette Street—

70 Q. How many switches have they there and the length of them?

A. They have about—they average about three or four hundred feet long I think, and there are about five in there and they have switch tracks—

Q. Is that below Henderson Street?

A. Yes sir.

Q. Between the upper protection levee and Henderson Street have they any yard facilities?

A. A good part of their line is used as a distributing line besides which they have between Louisiana Avenue and about Sixth Street they have about four tracks besides their two main lines.

By Mr. GILMORE: I would like to ask Mr. Milling the object of this testimony?

By Mr. MILLING: The object of the testimony is to rebut the idea that you have such a magnificent belt system and somewhat to affect the question of what it cost from the upper line to Henderson Street.

By Mr. GILMORE: You would not allow me to do that on account of an agreement which we have; and here it is, and it has this clause: "This agreement is entered into temporarily and shall continue until the lawsuit above referred to is finally disposed of, or until it is dissolved by either party after ten days' notice, and it is distinctly agreed and understood that this agreement shall in no manner affect the right of either litigant in the above law suit, nor the rights
71 of any of the parties under ordinances 1615 New Council Series and 1997 New Council Series, passed by the City Council of the City of New Orleans." This does not bear out your suggestion that I was bound by an agreement not to let the Court know that we were serving your railroad fully and satisfactorily.

By Mr. MILLING: I thought that clause was in there because I wrote it myself; I did not attend that conference but Senator Foster did, and I now see that the clause that I wrote is not in it; but if that is the way that you construe it I will withdraw my question.

NOTE.—Colloquy between Counsel.

By Mr. GILMORE: I want a ruling now on my question which was temporarily suspended until the agreement could be produced.

By Mr. RANDOLPH: We have withdrawn the question.

By Mr. RANDOLPH:

Q. Mr. Reynolds, how long did you say you had been connected with the Belt Railroad construction as Assistant Engineer?

A. I was there something over three years and a half.

Q. When did you begin the construction of that part of the Belt

Railroad that connects now with the tracks that were originally built by the Illinois Central and dedicated to the City of New Orleans above Audubon Park?

A. The tracks above Audubon Park were built by the Illinois Central.

72 Q. When did you begin the work of the construction of the Belt Railroad to connect with these I. C. tracks?

A. My recollection is, but I am not sure about that date, but I think it was long after May, 1905, that we began construction of the tracks.

Q. May 1905?

A. Yes, that is my recollection.

Q. Are you quite positive on that subject?

A. As to the date?

Q. Yes sir?

A. Well, I would rather look over my diary, which I have not with me, but I am prepared to swear it was about that date.

By the COURT:

Q. Do I understand that the Belt Railroad has completed a double track over all that portion that the Louisiana Railway & Navigation Company lays claim to?

By Mr. RANDOLPH: Yes sir.

By the COURT: And this is a petition to enjoin your interfering with the building of the road?

By Mr. RANDOLPH: At the time of the filing of the petition no part of this had been constructed.

By the COURT: I understand at the present day what I enjoined has been done?

By Mr. GILMORE: You granted an injunction against the defendants restricting them from interfering with the City of New Orleans, and since then all of the work has been done.

By the COURT:

Q. We are not dealing with anything but the building of this railroad?

By Mr. RANDOLPH: Yes sir.

73 By the COURT: And that is an established fact now?

By Mr. RANDOLPH: Yes sir.

By the COURT: I am not passing upon the rights of the railroad but upon the tracks?

By Mr. RANDOLPH: No sir, not at all; after the injunction these physical facts have been accomplished.

NOTE.—Colloquy between counsel.

By Mr. RANDOLPH:

Q. Mr. Reynolds, in May or June, 1905, is it not a fact that the Belt Commission had not begun any work on that part of the construction of the Public Belt Railroad until June, 1906?

A. Well, what do you mean by that part?

Q. I mean the part that is a continuation of the old track north of Audubon Park, which old track was built by the Illinois Central

and turned over to the City of New Orleans, from that point down towards Henderson Street, when did you begin that construction?

A. That was probably some time in 1906; but I am not sure about it.

Q. As a matter of fact had you struck a lick of work for the Belt Commission until the Louisiana Railway & Navigation Company had begun its work?

A. I don't know; I haven't got the records.

Q. Were you not in charge?

A. I was, yes.

Q. Why can't you say whether or not you had started work?

A. You must remember that this is a matter of three years *years* ago and I am not connected with the Belt.

74 Q. You have told this Court with great particularity what the Louisiana Railway & Navigation Company did on the morning when they were interrupted, that they had some rails and cross ties there and their men. Now, what did you and your Commission have there?

A. About fifteen policemen were there.

Q. Were they building the Belt line?

A. No sir.

Q. Isn't it a fact that you had not struck a lick of work in building that Belt line?

A. I would rather look over my diary on that point.

Q. Don't you recall that incident of these policemen being there and stopping this work that was being done by the defendant Company?

A. Yes sir.

Q. Is not your memory clear enough to know whether you and your force had done any work there at that time?

A. We had some men there grading on that morning.

Q. How long had you been there?

A. I don't know.

Q. Were they there the day before?

A. Yes sir, I think so.

Q. How many days before were they there?

A. I don't know.

Q. Can you look at your records and inform the Court when you actually started to work at that point?

A. I think so.

Q. Will you do so and furnish the Court with the information?

A. Yes, sir.

75 Q. Will you also furnish the Court with information when you began the construction in Audubon Park and down to Henderson Street?

A. Yes sir, there is a complete record kept in the Public Belt Railroad Commission office showing all of that. And I would not like to give you figures now because it is three years since I have been with the Public Belt.

Q. Now, you say that at that time when this arrest of the foreman of the defendant company in this case took place that at that

time and for some years previous, they had completed these two tracks north of Audubon Park toward the protection levee?

A. Yes, sir.

Q. Prior to this arrest had the Belt Railroad done any work on that completed stretch?

A. I don't think so; I am not sure.

Q. Were those tracks connected with any other tracks?

A. No, sir.

Q. It was detached fragments?

A. No sir, there was ten thousand feet of track.

Q. It was attached?

A. Yes, sir.

Q. There was no connection there at the South and North ends?

A. No, sir.

By Mr. GILMORE:

Q. From recollection is it not a fact Mr. Reynolds that prior to this incident, when the police interfered with the defendant that there had been work done on the tracks above Napoleon Avenue that had been built by the Illinois Central?

A. I would have to look at the record on that.

76 Q. You will examine the record and give us the dates?

A. Yes sir.

Q. Now, Mr. Reynolds who paid for the tracks above Audubon Park, between Audubon Park and the parish line?

By Mr. RANDOLPH: If he knows?

A. I don't know who paid for them.

By Mr. GILMORE: Who were they built by?

By Mr. RANDOLPH: I object, your Honor.

By Mr. GILMORE:

Q. Now, Mr. Reynolds, is it a fact that the Public Belt Railroad is now serving the Louisiana Railway & Navigation Company over the Public Belt Railroad system?

By Mr. RANDOLPH: We object to that on the ground that at this stage of the case it is wholly irrelevant. The issue here is whether or not we have any rights under our contract ordinance and whether the Public Belt Railroad is serving us throws no light whatever upon our rights under this ordinance.

By Mr. MILLING: We further object on the ground that if it is a fact that the Louisiana Railway & Navigation Company is delivering its cars now to the Public Belt, that we are doing so under a temporary written agreement in which it is stipulated that it was distinctly agreed and understood that this agreement shall not in any manner affect the rights of either litigant in the above law suit, nor the rights of any of the parties under Ordinances 1615 and 1997 passed by the City Council of the City of New Orleans, and it

77 being agreed by both parties that the fact that the defendant railroad company is accepting service from the plaintiff or accepting service from the Public Belt shall in no manner

affect the rights of the parties to this law suit, then such evidence is not admissible. Second, if the Court should hold that such evidence is admissible then the written agreement itself is certainly the best evidence of what was agreed upon in the matter and the written agreement is in the possession of the plaintiff.

By Mr. GILMORE: I will offer it in evidence right now, and have it marked A 14, for identification.

By Mr. MILLING: We interpose an objection to the written agreement, first, on the ground that it is irrelevant; second, that it is distinctly agreed in the agreement that it was not in any manner to affect the issues in this case, and therefore cannot be admitted in evidence. The agreement between the parties being the law between them in so far as the effect of the document upon the trial of the case is concerned. Third, that if this question is gone into then certainly it is a collateral issue that will consume a great deal more time. As to the service of the Public Belt Railroad Commission handling the cars of the defendant Company, if that is gone into, the Belt offering to prove that they have served and are serving the defendant company to its entire satisfaction, etc., then it
78 raises the issues as to whether or not that is a fact, and will require evidence on both sides to know to what extent they are serving the Louisiana Railway & Navigation Co., and whether or not the Public Belt is capable of serving them to the advantage of the defendant company.

By the COURT: The objection goes to the effect.

By Mr. MILLING: We reserve a bill of exceptions.

By Mr. GILMORE:

Q. Your answer is that the Public Belt system is serving the defendant, the Louisiana Railway & Navigation Company with its public belt railroad equipment?

A. Yes sir.

By Mr. GILMORE: Counsel for the Mayor, offers, produces, and asks to be filed in evidence a letter written by F. F. Haddix, Agent of the Louisiana Railway & Navigation Company under date New Orleans, March 10th, 1909, to the Superintendent of the Public Belt Railroad, Mr. A. G. Phelps; I will offer the original letter and it is marked A 15.

By Mr. RANDOLPH: We urge the same objection more so that the alleged contract just filed in evidence for temporary service is not responsive to any issues involved in this case.

By the COURT: The objection is over-ruled; of course, that cannot prejudice the defendant's right as far as a waiver is concerned.

By Mr. GILMORE: I will read this letter to your Honor: "You will
79 "note by referring to the memoranda attached that this line
"delivered you more cars in switch service, month of January, than any of the New Orleans lines, and we stood
"second in December; and I am satisfied that we stand first on the
"list, month of February, as we paid \$1,104.00 for February switch-
"ing.

"We would like to take this occasion to express our appreciation of the service that you have been giving us for the past sixty days. Will state our business has been handled very satisfactorily by the Public Belt, and our officials as well as myself, personally appreciate the effort you have put forth that brought about this good service. You have enabled us in quite a number of cases to make delivery to steamers on some of our cars within twenty four hours after the arrival through your tracks on the front. Yours truly, F. F. Haddix."

Admission: It is admitted after the statement made by counsel in argument that F. F. Haddix is local agent of the Louisiana Railway & Navigation Co.

By Mr. GILMORE:

Q. Do you remember, Mr. Reynolds, when those Illinois Central tracks above Audubon Park to the protection levee were laid?

A. No, sir.

Q. Can you look up the records and refresh your memory?

A. There may be plans or letters in the City Engineer's office that might show that; but they were laid prior to my connection with the Belt Road; but I think there is a letter that says that the tracks were inspected by the City Engineer and accepted by the City of New Orleans.

80 By Mr. GILMORE: Then I would request the witness to return tomorrow with his diary and record, so as to give us the dates when work was commenced on both ends, above and below Audubon Park. Will you endeavor to do so, Mr. Reynolds?

By Mr. REYNOLDS: Very well.

HON. MARTIN BEHRMAN, who being first duly sworn by the Court, testified as follows:

Direct examination.

By Mr. GILMORE:

Q. Mr. Mayor, what is the present situation of the Public Belt Railroad system of the City of New Orleans as to construction and operation?

A. The Public Belt is practically constructed and in full operation.

Q. Along what portion of the river front?

A. From the upper protection levee on the parish line down to Louisa Street.

Q. Is it connected with and is it serving the public wharves of the City of New Orleans?

A. It is practically the only connection to all of the public wharves of the City of New Orleans.

Q. Has it also connections with the various industries along the river front?

A. Yes sir, several industries along the river front, already have switches.

Q. Do you remember Mr. Mayor the fact of any conference or interview that was had prior to the institution of this suit, this suit having been filed June 26th, 1906, in your office?

81 A. I remember the conference but not the details.

Q. Mr. Mayor, did any agreement result from that conference?

A. Yes, sir, I understand the one that has been submitted here today was the one.

Q. I mean in 1906, when the officers and attorneys of the defendant company appeared in your office, and there was a discussion had with no results, that was back in 1906?

A. I don't remember the details.

Q. You remember the fact of that conference?

A. Oh, yes, there was a conference.

Q. But no result in the way of an agreement followed from that conference?

A. I don't remember of any.

Q. This later agreement was on August the 25th, 1908, and this is the result of a different conference than the one I refer to?

A. We had several conferences prior to the institution of this suit.

Q. Who paid for the construction of the Public Belt?

A. The funds of the City of New Orleans.

Q. Is there a complete Public Belt railroad system between Henderson Street and Audubon Park?

A. Yes sir.

Q. The territory claimed by the Louisiana Railway & Navigation Company?

A. Yes sir.

Q. And the Public Belt Railroad system through the agency of the Public Belt railroad commission is operating the Public Belt?

A. Yes, sir.

Q. And is actually serving the different railroads and the public?

82 A. Yes, sir, to their entire satisfaction.

By Mr. MILLING: We urge the same objection as heretofore urged to the last statement of the Mayor.

Cross-examination by Mr. MILLING:

Q. Mr. Mayor, you remember when this suit was filed I reckon, don't you?

A. The dates?

Q. No sir, the occasion?

A. Oh yes.

Q. You know Governor Sanders?

A. I do, very well.

Q. You remember his having seen you and spoken to you?

A. Yes sir, he talked to me a whole lot.

Q. About a compromise of this matter?

A. Yes, a great many times.

Q. Do you remember when the Progressive League appointed a

Committee and they took it up with you also in discussing the question of compromising this suit?

By Mr. GILMORE: If your Honor please I object; there is an allegation that some persons went to the Mayor, but they do not say who these persons were.

By the COURT: I think it is admissible.

By Mr. GILMORE: I reserve a bill of exceptions.

By Mr. MILLING: You can answer the question Mr. Mayor?

A. Yes; I remember that.

Q. Now state when was the last time that the Committee from the Progressive League called upon you if you remember?

A. No sir, I do not remember.

83 Q. Do you remember that the last time when the question of compromising this suit was discussed, was on the same day or the day before this written agreement was entered into by which the Louisiana Railway & Navigation Company were to use the Belt tracks in order to reach the wharves on the river front?

A. No, I don't remember.

Q. In order to refresh your memory, Mr. Behrman, and I do not mean that your memory is bad or anything of that sort, but I know you have so many conference,—but do you remember in the Mayor's parlor, in the presence of myself and Mr. Gilmore, when a Mr. McWilliams appeared before you and discussed the question here, and another gentleman, Mr. Norman Walker, I believe,—do you remember that?

A. Yes, sir.

Q. And that was the last conference that was held in reference to a compromise of this case?

By Mr. GILMORE: If you remember, Mr. Mayor?

A. It had very little effect upon me, I mean, those two gentlemen.

By Mr. GILMORE: Are you endeavoring to show by this witness that there was any attempt to compromise this case between June, 1906 and just before this last agreement was entered into in August, 1908?

By Mr. MILLING: Most assuredly.

By Mr. GILMORE: That there was any action taken before the filing of this suit and just before the last agreement in 1908?

84 By Mr. MILLING: Yes, most assuredly.

By Mr. MILLING:

Q. Then, document A 14, the agreement relative to the use of the Public Belt by the Louisiana Railway & Navigation Company was entered into either the same day or the next day or a short while after this last conference?

A. I don't remember that; I remember Mr. McWilliams and Mr. Walker called upon me as a Committee from the Progressive Union, and they did not impress me very strongly because there was no action taken; I believe that this agreement was entered into, which

seemed to be eminently satisfactory to you and those you represented at the time and they seemed to be delighted that an agreement had been made so that they could go on with their business.

Q. Do you remember the signing of the agreement?

A. Of course I signed it.

Q. How much time intervened between the time Mr. McWilliams and Mr. Walker, a Committee from the Progressive Union called upon you, and the signing of the agreement?

A. I don't remember the date; when Mr. McWilliams called or Mr. Walker; but I do know they called.—when and what time or year I don't remember. I have a multiplicity of these things all the time, and some of them are waiting for me now.

Q. Have you the figures Mr. Behrman of the cost of the Belt Road from the upper property line of Audubon Park to Henderson Street?

A. No, sir, they are public records in the City Hall, open to inspection.

Q. If the gentleman whom we have asked to produce that don't do so, will you see that they are brought down?

85 A. Oh yes; they are public records at your disposal.

Q. I believe you charge a uniform switching charge to all railroads?

A. Yes, sir.

Q. What is the charge?

A. Two dollars a car and empties free.

Q. You mean that you return them when empty free?

A. Yes; we take a loaded car and return the empty one.

Q. And that charge is made to all railroads?

A. Yes sir.

By Mr. GILMORE: You are President ex officio of the Belt Railroad?

A. Yes sir.

Q. And Mayor of the City of New Orleans, of course?

A. Yes sir.

WILLIAM B. BLOOMFIELD, who being first duly sworn by the Minute Clerk, testified as follows:

Direct examination by Mr. GILMORE:

Q. Mr. Bloomfield, what is your business?

A. I am a commission merchant.

Q. Have you any connection with the Public Belt Railroad Commission?

A. Yes sir, I have been identified with it for about ten years.

Q. Are you on any of its Committees or do you hold any position?

86 A. Yes sir, I am a member of the Commission and a member of the Finance Committee.

Q. Chairman of the Finance Committee?

A. Yes sir.

Q. Mr. Bloomfield, is the Public Belt Railroad of the City of New Orleans—has it a complete system of construction and is it in

operation along the river front from the upper Parish line down to Montegut Street?

A. Yes, sir; it has a complete system and it has tracks on nearly every wharf on the river front, serving the various steamship lines.

Q. How long has the Public Belt been in operation?

A. It commenced on the 18th of August, 1908.

Q. It has been in operation nearly a year?

A. Yes sir.

Q. It is connected you say with all of the wharves and steamship lines?

A. Yes sir, we have tracks on all of the wharves to serve the ships.

Q. What board does the Public Belt serve as an adjunct of?

A. It serve- as an adjunct to the Dock Board.

Q. Is it a necessary adjunct?

A. Yes, sir, very essential.

Q. Is it possible properly to administer the public wharf system of the State of Louisiana without the supporting service of the Public Belt railroad?

A. No, sir, and I consider it absolutely essential.

Q. Is there a double track belt railroad running between Henderson Street and the upper Parish line covered by all of the territory claimed by the defendant Company?

A. Yes sir, our public belt.

Q. And the Public Belt's locomotives and equipments are actually in operation along there?

A. Yes sir, they are operating daily.

Q. Is the Belt Railroad Commission doing any business for this defendant company in this City?

A. Yes sir, they have an interchange track and are doing business with them.

Q. Have you had any complaints from the defendant company of incomplete or improper service?

A. No sir, I heard no complaints, but I have heard a very commendatory letter written by the agent of this company to the Belt Railroad Commission.

By Mr. MILLING: Please note the fact that I renew my objection.

By Mr. GILMORE:

Q. Is there any obstacle in the way of the cars of the defendant Company reaching the river side at any point as long as the public belt is serving them?

A. No sir; there is no difficulty in their reaching the river front and we serve them as all other roads.

Q. Does the service of the Public Belt enable them to reach every portion of the river front and every public wharf in the City of New Orleans?

A. Yes sir.

Q. Even below Henderson Street?

A. Yes sir.

Q. Then it is giving them the same service as a private right of way that they claim they have?

88 By Mr. RANDOLPH: We object; that is an argument in the case.

By Mr. GILMORE: That is not an argument, but it is a fact.

By the COURT: It is the basis of an argument, but the objection is over-ruled.

By Mr. RANDOLPH: We reserve a bill of exception.

A. We are giving service considerably below Henderson Street.

By Mr. GILMORE:

Q. Who paid for the construction of the Public Belt road?

A. The City of New Orleans.

Q. Do you remember the figures as to the cost of the Public Belt?

A. I don't know right now; I can get the figures of the double track.

Q. Can you state from your memory and approximately the amount invested up to date by the City of New Orleans in the construction of the Belt Railroad with its equipment?

A. Between \$325,000.00 and \$350,000.00 it must be.

Q. How was that money appropriated?

A. It was appropriated out of the revenue of the City of New Orleans.

Q. Annual current revenues?

A. Yes sir.

Q. You do not know the details and the figures of how much was spent for the completion of the track between Henderson Street and the upper line of Audubon Park?

A. No sir.

Q. You do not know what the Illinois Central Railroad Company paid for the construction of the tracks above the Park which that Company dedicated under an ordinance for public use to the City of New Orleans?

89 A. No sir, I do not.

Cross-examination by Mr. MILLING:

Q. What roads do you serve in the City with your Belt?

A. The New Orleans & North Eastern; Morgan's Louisiana & Texas; the Illinois Central; the L. & N. and the Louisiana Railway & Navigation Company.

Q. Hasn't the Illinois Central Railroad Company its own terminal on the river front?

A. Yes sir, but we transfer business for them also to various wharves.

Q. And your Company I suppose also have business for the Morgan road?

A. Yes sir.

Q. Don't the Morgan's Louisiana & Texas Railroad and Steamship Company, or the Southern Pacific use a small portion of the Public Belt tracks in going from their wharves to any other wharves on the river front?

A. They have their own independent tracks.

Q. Isn't there some agreement by which they use a portion of the Public Belt track?

A. No sir, they use no portion of our tracks.

By the COURT:

Q. You are serving all of the railroads except the T. & P.?

A. I should have said the T. & P.

Q. Then you are serving all of the railroads except the Southern Pacific?

A. Yes sir.

By Mr. MILLING:

Q. Now, Mr. Bloomfield, have you any lumber yards?

A. No sir.

90 Q. Suppose the L. R. & N. would bring a train load of lumber in here what would you do with it?

A. If it was destined to these various wharves we would deliver it to the wharf that it is destined to, under the Dock Board.

Q. You haven't any wharves where you deliver lumber?

A. That depends.

Q. Have you any facilities for handling the lumber from North Louisiana if it were brought here and put on your Belt tracks for the purpose of exportation?

A. We can switch it to any wharf.

Q. But you haven't any yard room or any lumber wharf?

A. That is not the business of the Public Belt Commission but it is the business of the Dock Commission.

Q. You haven't any switches for that purpose?

A. We have switches on the present wharves.

Q. You cannot handle train loads of Lumber?

A. That is for the Dock Commission, the wharves.

Q. But have you switches and wharves for doing that?

A. In which way, Mr. Milling?

Q. I mean in bringing up cars and switching them?

A. We are switching lumber now to the different wharves.

Q. A car load at a time?

A. Oh more than one car load.

Q. If you had fifty car loads of lumber a day what would you do with them?

A. It would be like any other freight: you could not put it all on the wharf at one time.

Q. That is the very point. Have you got switches to accommodate it while being unloaded?

91 A. If we were tendered one hundred car loads of cotton for one wharf we could not haul it in one day.

Q. You have better facilities for handling cotton as far as the wharves are concerned than you have for handling lumber?

A. It is the same to us.

Q. You have no wharves to handle lumber?

A. We are handling lumber every day and hauling it to the various wharves.

By the COURT:

Q. The wharves are under the control of the Dock Commission?

A. Yes sir.

Q. If the Dock Commission furnished the wharves sufficient to handle a large number of lumber cars would you be able to deliver them on that *warf*? (wharf)

A. We would, yes sir.

Q. So, if it was a question of getting facilities for loading lumber on these wharves the first proposition would be to get the wharf room from the Dock Board?

A. Yes sir.

Q. And if they were able to handle it you would haul it?

A. Yes sir, and I want to bring out the fact that we are handling lumber nearly every day.

Q. If there is any trouble in the handling of lumber it lies in the lack of docking facilities and not in the lack of hauling facilities?

A. Exactly sir.

By Mr. MILLING:

Q. How many engines have you?

A. Four.

Q. How many switches have you between the upper protection levee and Henderson Street?

92 A. I would have to look at the record for that.

Q. How long is the longest switch that you have?

A. I would have to look at the record for that but we have about twenty-five miles of main track and switches on the river front.

Q. What I am trying to find out is just what size trains you can handle; for instance, with a car load of lumber I want to see if you have switches enough to handle it?

A. We have switches, but I haven't got the record with me.

By Mr. GILMORE:

Q. Have you any knowledge of a proposed improvement by the Port Commission including the construction of a complete lumber wharf?

A. That has been under consideration for some time.

Q. Have plans been made or are they to be made?

A. I don't know, but I know that it has been under discussion and consideration.

Q. Did Mr. Reynolds, as the Engineer of the Public Belt ever prepare plans for such a lumber wharf and submit them to the approval of the Dock Board?

A. Mr. Reynolds went into the matter and was instructed to prepare the plans and so forth.

Q. Does any locomotive of any private railroad entering the City of New Orleans operate over the Public Belt System?

A. None; they are operated entirely by the Public Belt.

Q. All of the locomotives and equipment that operate over the Public Belt belong to the public?

A. Yes sir.

Q. Would it be possible to handle a Public Belt railroad which could be operated with trains and locomotives of different
93 railroads operating over its tracks?

By Mr. MILLING: I object.

By Mr. GILMORE: He is an expert.

By Mr. MILLING: This cannot be received for the purpose of maintaining the issues in this case because the action is one of contract.

NOTE.—Argument by counsel.

By the COURT: The objection is over-ruled.

By Mr. MILLING: We reserve a bill of exception.

By Mr. GILMORE:

Q. Would it be possible to handle a public Belt Railroad which would be operated with trains and locomotives of different railroads operating over its tracks?

A. I think it would produce a very chaotic condition of affairs.

Q. Would it or not destroy the character of the Public Belt system as outlined by the original ordinance No. 147 of the City Council, and as understood by the government and by you as a member of the Commission and the members of the Port Commission?

By Mr. MILLING: We object to that question because the witness is called upon to construe certain ordinances and resolutions, and while he may be an expert railroad man and can determine whether two railroads can operate over the same road, he certainly should not be called upon to give his opinion as to whether or not it destroys the Belt Railroad as contemplated by the commission.

By Mr. GILMORE: I submit.

94 By the COURT: The objection is maintained.

By Mr. MILLING: We reserve a bill of exceptions.

By Mr. MILLING: Mr. Bloomfield I didn't catch your answer to the question as to whether or not it was possible to permit another railroad to operate on the Belt. What was your answer to that?

A. I think I said it would produce a very chaotic condition of affairs and practically destroy the usefulness of the Belt. I didn't finish that answer; for instance, if we have a system of double tracks and radiating from these tracks are these different switches 700 feet long, and you come along with a train of twenty cars and put one car on one switch and five cars on another, and if a main line comes along and uses our track, we would be out of business for a
time.

Q. You have how many engines?

A. Four.

Q. How many are you using?

A. Generally from two to three.

Q. You could use four?

A. Yes sir.

Q. And you could use six if necessary?

A. We haven't tried it yet but I suppose we could.

Q. You would have to have six trains to use six engines?

A. Yes sir.

Q. What would be the difference if a railroad train offered its own crew and engines and cars to and you directed them exactly as you directed the cars on that belt?

A. We fully control our engines.

95 Q. Very well; I am putting the proposition to you that if you control the engine and the crew of the railroad, the whole being under your orders, that delivers its train to you, I want to know why you could not handle this train of cars the same as you handle the other cars?

A. I think it would be a mix up.

Q. But if they did obey your instructions how could you have a mix up?

A. We would not be attending to our docking business at the time.

Q. Supposing you were handling ours, the question is whether or not you could do it, that is the point.

By Mr. GILMORE: We do not deny that it is a physical possibility to run more locomotives on the tracks than ours.

By Mr. MILLING:

Q. It is a fact that different railroads operate over the same tracks, isn't it?

A. That is more on a main track question, as I understand it, simply a straight haul, where they would pull a car right straight through to some destination.

Q. Is it not a fact that they have joint yards in numerous towns where they handle all their cars jointly, for instance in Houston there is a joint arrangement by which all of the cars are handled there?

A. They may, but I am referring now to the Belt system on the wharves.

Q. Is there any difference where the terminals in a town are on the river front or where they are in the town with straight tracks?

96 A. Yes, I consider it a difference on account of our limited area on the wharves.

Q. At Alexandria, is it not a fact that they have joint yards there?

A. I don't know.

Q. Are you an expert railroad operator?

A. No sir.

Q. Have you ever been in the railroad business?

A. No sir, only my connection with the Belt.

Q. Do you know anything about running a train?

A. No sir, except what I learned through the Belt system, and my connection with it.

Q. Do you know anything about dispatching a train?

A. No sir.

Q. You are not much of an expert on the question of handling cars then are you?

A. I would not attempt it, sir.

Q. Don't you know as a fact that the Terminal Company in the City of New Orleans is accommodating four different companies who run over those tracks with their own trains?

A. No sir, I don't know it but I think they must be accommodating railroad companies.

Q. Is it not a fact that the trains of the North Eastern and the Great Northern and the Louisiana Railway & Navigation Company run over their track?

A. Yes sir.

Q. Then it is possible for three or four railroads to operate over the same track?

A. On account of the wheelage business.

97 Q. Suppose the Terminal Company uses the North Eastern and they give the right to run into the station for ten thousand dollars a year, what is the difference between that and the wheelage business?

A. That is on the same principle when you pay ten thousand dollars a year for the wheelage business.

Q. What is the difference instead of paying two dollars a car by the Louisiana Railway & Navigation Co., if that Company would say to the Belt authorities: We will give you two hundred dollars a month?

A. It is simply that we do not want them to operate on our tracks.

Q. Before your Public Belt Railroad was built, when you only had ten thousand feet built, and you made a proposition to a railroad company,—if you build the rest of it we will allow you to operate your trains on this Belt system, under our supervision and direction, on the condition that you build a track,—how could that possibly affect your Belt system?

A. The Public Belt Commission did not do that.

Q. But suppose they had done so?

A. We would not want it; we would think that that would produce a chaotic condition.

Q. But could not that have been done?

A. I do not think so with any success.

By Mr. RANDOLPH:

Q. I understood you to say Mr. Bloomfield that you were a merchant.

A. Yes sir.

Q. In what business?

A. Commission.

98 Q. Cotton and Sugar?

A. Cotton, Sugar and Molasses.

Q. And you have been in that business all your life I assume?

A. Yes sir.

Q. You never have been in the railroad business?

A. No sir.

Q. And you know nothing of the practical operation of a railroad train?

A. No sir.

Q. Or of the management of trains?

A. No sir, I never have been in the railroad business.

By Mr. GILMORE:

Q. How long have you devoted yourself Mr. Bloomfield to the study of a public Belt Railway system for the City of New Orleans?

A. Since 1897, for the advocacy of a Public Belt Railroad system for the City of New Orleans.

By the COURT:

Q. Mr. Bloomfield, what is the trouble in this matter? That is what I want to know? What is the difference between operating under this contract and operating on this two dollar a car business? I mean what difference is it to the defendant, outside of this question of compensation?

A. I consider that they consider this a valuable franchise right that they have obtained, and I assume that it would add to their franchise several millions of dollars if they wished to sell their road to somebody in the future they would sell it with these
99 valuable rights obtained, which are the City's rights and could be considered worth ten or twenty million dollars with the growth of the City and therefore if they get possession of the river front they then have this valuable right which would put them in this position of immensely increasing their franchise.

Q. Mr. Bloomfield, I am speaking of the advantage or disadvantage to the Company in operating under this ordinance under which they claim No. 1997,—I want to know, or in operating under your present system on the other what is the real difference between the two?

A. They would like to have the right to run their own trains on the City's tracks, and my opinion is that it is better for them to let us take their cars and deliver them to all of the wharves on the river front.

Q. In other words, is there a profit on this two dollars a car for handling it?

A. There might be a small profit. But it does not amount to anything and we believe it is better for them to let us handle their cars.

Q. Is there a profit to the Belt Railroad to make it an object to a Railroad Company, is there any great profit in this two dollar a car?

A. We do not think that it is any greater advantage to them except that they want to control the situation.

By Mr. RANDOLPH: That is an opinion of course?

By the COURT: Mr. Bloomfield, in other words, if it would cost the Louisiana Railway & Navigation Company as much as you charge them for moving their cars, that is to say, two dollars per car to operate on this road, the only difference between you under

100 the contract or your present system would be that they would be hauling with their own locomotives instead of having them hauled by yours?

A. Yes sir, that is it.

By Mr. MILLING: On that point I can inform the Court what we claim about the matter and can follow that up with proof if the Court considers it pertinent to the issues.

By Mr. GILMORE: Are you through with Mr. Bloomfield?

By Mr. MILLING: We are.

NOTE.—The further hearing of testimony in this case was continued to Wednesday, March 24th, 1909, at 11 o'clock, A. M.

101 WEDNESDAY, *March 24th*, 1909.

This cause came on this day for further testimony.

Present: The Hon. John St. Paul and all parties in interest represented by Counsel.

Col. J. D. HILL, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. GILMORE:

Q. Col. Hill, do you hold any official position in connection with the Public Belt system of the City of New Orleans?

A. I am one of the Commissioners.

Q. For how long a time have you been identified with the Public Belt Railroad of the City of New Orleans?

A. Since 1897.

Q. Since your appointment as a member of the Board of Commissioners of the Belt Railroad have you taken an active interest in the affairs of the Commission?

A. Yes, very.

Q. Do you remember what occurrences there were immediately preceding the filing of this suit on June 26th, 1906, relative to an adjustment between the Louisiana Railway and Navigation Company and the City of New Orleans?

By Mr. MILLING: We make the same objection as was interposed to similar testimony given by Mr. Bloomfield.

By Mr. GILMORE:

102 Q. Do you remember any conference in the Mayor's office between the officials of the Louisiana Railway & Navigation Company and their attorneys and the Public Belt authorities and the Mayor of the City of New Orleans previous to the filing of this suit?

A. Yes, sir. I was present at that conference; it occurred in the Mayor's parlor.

Q. Did any agreement result from that conference?

A. No sir, it did not.

By Mr. RANDOLPH: As I understand Counsel for the City of New Orleans simply desires to prove the fact of an agreement vel non; the witness has answered the question and that is all that is necessary.

By Mr. GILMORE:

Q. Go on and state what you were going to say, Colonel?

A. I am simply going to state that no agreement was reached because the subject discussed at that time, the opening by which the Louisiana Railway & Navigation Company would reach the river front, was rejected by the defendant Company itself. The effort of the Public Belt being at that time as it had been all along, to get other railroads to the river front.

By Mr. RANDOLPH: If your Honor please we object on the ground that it is not responsive to the question.

By the COURT: The substance of it is at any rate that you not only did not reach a conclusion at that time but you reached the conclusion that you not going to agree thereafter?

A. Yes sir.

103 By Mr. GILMORE:

Q. Do you know of any other proposition of settlement or adjustment or compromise made by the Louisiana Railway & Navigation Company from the time you refer to prior to the filing of this suit?

A. No sir, none ever reached the Commission, and I knew generally what was going on there.

Q. Colonel Hill, in the year 1908, in the Summer, there was another arrangement made—

A. I was absent from the City in the Summer of 1908.

Q. You are not aware of any negotiations?

A. No sir.

Q. Col. Hill, what is the present physical condition of the Public Belt system as far as its construction is concerned?

A. It is constructed now from the Upper Protection levee down to Louisa Street, I think it is, and it has been operating lower down than that in aiding the construction and building of a levee below that point.

Q. Do I understand you to say that the Public Belt service has been used in the construction of new levees?

A. Yes sir, it has.

Q. Has the Public Belt system any connection with the public wharf?

A. The most intimate. They are absolutely so.

Q. Is there a switch line connection between the main line of the Public Belt system and the public wharves?

A. Yes, sir, there is, but by a loop that will be put in evidence shortly it will be seen that all of the steamship lines will be connected with the Public Belt.

104 Q. Is it not a fact that Public Belt tracks connecting with the wharves are in many instances the only tracks?

A. Yes sir.

Q. What connection has the Public Belt with the public wharves?

A. It is the feeder bringing everything that is brought into the City to the vessels, and also taking everything that is brought into the City to the steamships going out of the City of New Orleans.

Q. As a matter of fact does the Public Belt system serve the Louisiana Railway & Navigation Company?

A. It does.

By Mr. MILLING: Objected to for the same reason as was urged to similar evidence of Mr. Bloomfield and the other witness.

By the COURT: The Court makes the same ruling.

By Mr. MILLING: This objection and ruling is to stand in lieu of any further objection or evidence of this witness.

By Mr. GILMORE:

Q. Have you heard any complaints from the Louisiana Railway & Navigation Company as to inadequate service on the part of the Public Belt system?

A. On the contrary; within the last month approval has been made by one of the subordinates of that line of the service rendered to their railroad by the Public Belt.

Q. Does the Public Belt serve any other trunk line, the line besides the Louisiana Railway & Navigation Co.?

A. It has interchanges with every other line coming into 105 the City except the Southern, and it practically reaches that line through the Louisville & Nashville.

Q. What is the difference in principle and practice between the Public Belt system of the City of New Orleans as devised and constructed under the existing laws and ordinances and a system of joint track or tracks generally used by a number of trunk lines?

A. Do you mean joint tracks convenient to a terminal or joint tracks out in the country beyond the City?

Q. Tracks to be generally used as suggested by the language of the Frisco ordinance and the Louisiana Railway & Navigation Company?

A. The Belt system traverses along the entire river front and believes it is impossible to do the service that is needed by a Belt if another company is permitted on its tracks; and any attempt to have joint control on any part of the tracks of the Belt system means that some other power or authority would step in, and if they once got possession of the tracks there is nothing but force that would prevent them from using that track.

By Mr. MILLING: We object on the ground that this is an argument in favor of the Belt track and the City of New Orleans and which has no bearing upon the trial before the Court.

By the COURT: The objection goes to the effect; we had better have a full understanding of the whole situation.

A. It differs also, may it please the Court, from having a terminal with different lines of cars running their trains coming from a

distance because they can be controlled by a dispatcher, and
 106 whenever a line inside of a terminal is empty, of course any
 line that comes in the Northeastern or the Texas & Pacific
 or any other line of railroad having a train due on schedule time,
 could have it indicated that that line was coming and have it run
 straight over the tracks for miles, and it stays there as long as re-
 quired; but the Belt road, on the contrary has to pick up cars at
 any and every point that it is indicated, and they have to be
 transferred and may have to shut off the whole train, and when
 they come on the river front and require to be put at some special
 point, the engineer has got to know just exactly how to use that
 track for the purpose of getting those cars in at certain places; and
 you cannot have a train dispatcher at one place to tell him where
 he can drop a certain car; and it is impossible to have a car put over
 the belt without destroying the whole system of the Belt.

Q. What effect upon the Belt system would be the granting to
 the Louisiana Railway & Navigation Company and other lines the
 privilege of operating over the Belt line with their private trains?

By Mr. MILLING: Objected to, first because it is not relevant to
 the issues in this case, and, second, it is a matter of opinion.

By the COURT: The objection goes to the effect.

A. It would destroy absolutely the efficiency of the Belt system
 and make it a practical impossibility to do any Belt business.

By the COURT:

Q. If the Louisiana Railway & Navigation Company or
 107 any other concern who have facilities of its own on the river
 front, and eliminate for the present the question of cost,
 could your Belt road handle a solid train for it from the end of this
 line into this property of its own?

A. Absolutely, I mean with the same service that is tendered by
 us to other railroads that could easily be done for the Louisiana
 Railroad & Navigation Company, and if they bring their trains to
 the Jefferson line we could attach our locomotives to them and bring
 them into their lines, and all this that was said about having to de-
 tach their trains is not a fact.

That means when they brought their cars in a train to the Jeffer-
 son line they would have to take it into a terminal; and all they
 have to do now is that we give them a locomotive and give them the
 same service they render themselves and quite as cheap.

I say it for this reason: I was speaking——

By Mr. MILLING: If your Honor please we object.

By the COURT: Would it be possible to take a full train bring it
 to their yards unbroken and then let them distribute it over their
 property as they saw fit?

A. Yes sir.

Q. Could you give that service as efficient as if they came in with
 their own locomotives?

A. We could; and there is no reason on the face of the earth why
 not. We have locomotives big enough to haul all their trains.

Mr. GILMORE:

108 Q. As a matter of fact isn't it being done for the Louisiana Railway & Navigation Company right now?

A. Yes, and one of their agents has stated the fact that it was being done to their entire satisfaction.

By the COURT:

Q. You are not taking solid trains?

A. I don't know how they are brought down but I know they are taking solid trains now.

By Mr. GILMORE:

Q. You have spoken of the cost of the service. Is the cost of the service over the Public Belt system higher to the Louisiana Railway & Navigation Company than it is for any of the other trunk lines dealing with the Public belt?

A. No sir.

Q. Have there been any complaints made to the Public Belt authorities?

A. No sir; I have not heard any.

Q. Is there any profit to the City of New Orleans resulting from the uniform charge of two dollars a car?

A. Up to the present time and by a statement made in the last ten days it has been shown that since we commenced operations our profits, without writing off anything for deterioration, has amounted to something like four or five hundred dollars and that has been possible by reason of the fact that we have handled solid trains of dirt in this levee contract for the upper and lower part of the City and by reason of having solid trains it has paid us better than if we had odd cars.

109 Q. Under the legislation providing for the Public Belt system, is it possible for any profits to result?

A. The fixing of the rate of two dollars per car is fixed on the theory that that would be the cost of doing the work.

Q. If there is anything left over expenses what is done with that money?

A. It is used to develop the Belt system.

Q. In other words, that amount is invested in increased facilities for the commerce of the City of New Orleans?

A. Yes sir.

Q. Do you know whether or not the Public Belt system is presently handling lumber?

A. I do; that is, I am so informed from the office.

By Mr. MILLING: I object; if he has been up there and seen it he can state it.

By the COURT: I think it is part of the Belt Commission's business to know what is going on. Do I understand Colonel that you are speaking of your own office?

A. Yes sir, of the Belt Commission office, and the officers report

these things to us. As much as forty cars of lumber have been received by the Belt system.

By Mr. GILMORE:

Q. In one day?

A. Yes sir; the order came at one time, and it is handled as the cars are delivered, and that brings up the point that was suggested on yesterday, that our anxiety is to have a lumber depot on the river front; and we stand as a Public Belt system to furnish all the facilities necessary. I want to say in passing that the Louisiana
110 Railway & Navigation Company, nor any other railroad coming in the City of New Orleans cannot establish what they seemed to think they had the right to on yesterday without the authority of the Port Commission, and we ourselves have that authority.

By Mr. MILLING: That is immaterial; we don't want that decided now, but we do want it decided by a Court of justice some time in the future.

By Mr. GILMORE:

Q. When the Belt system is extended as contemplated to run entirely around the City, will that enable the railroad having no river front terminal to reach the river front?

A. Yes sir; and as I have said there is no railroad that is not connected with us except the Louisiana Southern.

Q. Is there any other railroad than the Public Belt system that has a system of tracks in a continuous line from the upper Parish line to Montegut Street along the river front over which their cars can be switched from any one point on the river front over to another point on the river front?

A. No sir, it must all be done by an interchange between the different systems.

Q. Is there any system by which a car can be carried on the river front with one handling?

A. No sir, unless we switch with the Texas & Pacific to run from Elysian Fields to Girod Street.

Q. Is there any system on the river front other than the Public Belt which can take a car from the Louisiana Railway & Navigation Company at Henderson Street from the Parish line to the North
111 Eastern depot with that one exception?

A. No sir, there is none.

Q. Then, if the Louisiana Railway & Navigation Company does business with the Public Belt, it requires a greater facility and better rate than it would if it ran over its own track from the Parish Line to its Octavia Street property?

A. It has greater advantages in the service rendered by the Belt than by its own line.

Cross-examination by Mr. MILLING:

Q. What is your business, Colonel Hill?

A. Planter and attorney at law.

Q. How long have you been engaged in the railroad business?

A. I have been interested in the Belt Railroad business since 1907.

Q. What are your duties there?

A. A member of the Commission?

Q. What duties have you in connection with the management or operating of the road proper?

A. As a matter of fact Mr. Bloomfield and myself have been pretty much the managers of the Belt Railroad since it started; therefore, I want to say that so far as the Belt railroad system is concerned in New Orleans I am fully qualified to be called an expert; in fact, I am the father of the Belt you might say.

Q. You have never actually operated a train have you Colonel?

A. No sir.

Q. You have never been a train dispatcher?

A. No sir.

112 Q. And you have never been President of a Railroad Company?

A. No sir.

Q. Never have been a telegraph operator?

A. No sir.

Q. You never were even a station agent?

A. No sir.

Q. Since you were appointed on the Belt Commission you have been identified with the building of the Belt, haven't you?

A. I was active in the building of the Belt road before the Commission was formed and ever since the last Commission, because one of the Committees organized was made up entirely of citizens.

Q. Do you know anything about the actual operating of a steam railway train?

A. Nothing except I got my information through the Belt Commission office, and what I have gained by being on the river front.

Q. Have you ever been at the interchange tracks of the Louisville & Nashville Railroad?—I mean the L. R. & N.?

A. I have been up to the Protection Levee.

Q. When were you up there last?

A. I think the last trip was three months ago.

Q. Have you ever had any complaints from the railroads or railroad agents with reference to the service over this Public Belt system?

A. There have been complaints made by individuals and I suppose they would occur at all times by people who—

Q. I simply asked you the question if you had any complaints?

A. I want to state the reason; a complaint from a person not getting a car as rapidly to its destination as they require.

113 By the COURT:

Q. The question is whether you got any complaints from railroad agents?

A. I was thinking more particularly about individuals.

Q. No; he asked you about railroad agents. Did you get any complaints from any of the railroad people?

A. That would be hearsay of course.

By Mr. MILLING:

Q. You have been giving us a great deal of hearsay?

A. I have been informed that one railroad here has stated it was dissatisfied with the service rendered at one time, but since that date it has written a letter that it is perfectly satisfied with the service.

Q. What railroad is that?

A. The Southern Pacific.

Q. Now, you say that it would be utterly impossible to operate the Belt Railroad if you permitted the Louisiana Railway & Navigation Company to operate upon your tracks?

A. I not only say that but I say that no other railroad company than the Belt itself could be permitted to have one minute's authority on the Public Belt system without destroying the Public Belt system.

Q. Are you familiar with the contract under discussion?

A. Yes sir.

Q. Have you read it?

114 A. Yes sir, and I have to say that it seems in my opinion—
Q. I only asked you if you read the ordinance and that is all?

A. Yes sir, and I want to call a part of the ordinance to your attention that you didn't see.

Q. If we didn't see it it is our own fault. Suppose we had this kind of an arrangement, that we brought our trains down to the Parish line and when they got there they passed under the authority of the Belt Commission, and the Commission or their Manager or Operator directed us as to the manner in which to handle those trains upon the Belt Railroad tracks—I want to know if you have any objection to that?

A. This is our system; the minute you put your cars on the interchange we are ready to take them, but we don't want your locomotives and men to get on our track because they can say after they once get on them "I will stand here as long as I think it is necessary."

Q. Well, suppose that one of your engineers would say: We have a car here and propose to stay here as long as we please. What would you say to him?

A. We would discharge him.

Q. Suppose in the arrangement of the Louisiana Railway & Navigation Company, or one of the crew would say: I propose to stay here. What would you say?

A. We would not allow it.

Q. If these men were under your absolute control and management?

A. We discussed that with the T. & P. within the last month.

Q. I haven't asked you anything about the T. & P.?

115 By Mr. GILMORE: If your Honor please I think it is pertinent for the witness to state what happened in regard to the Texas & Pacific on the same matter that Counsel questions him about.

By the COURT: The objection is over-ruled.

By Mr. MILLING:

Q. Suppose that every railroad in the City of New Orleans was interested in the Belt Railroad, and they were operating it by a Commission, to the advantage of all,—don't you think that this is feasible and practicable?

A. It would be perhaps in the interest of the railroad but the distinction is that the Public Belt is planned entirely to give advantages to the City of New Orleans, and to preserve the interests of the citizens, and they desire to have them preserved.

Q. When did they get into that notion, Colonel Hill?

A. Thank heavens——

Q. I don't want that; you remember when the Frisco Ordinance and the L. R. & N. ordinance were before the City Council?

A. I do, because I opposed it bitterly.

Q. Do you remember that every Exchange in the City of New Orleans was in favor of the L. R. & N. ordinance?

A. I remember more than that.

Q. I just want that and when I want more I'll ask you. You remember that don't you?

A. I have heard individuals from the Exchanges——

Q. Now, don't you know that every Exchange in the City of New Orleans favored the L. R. & N. ordinance?

A. I can say that I know some resolutions were passed at that time.

By Mr. GILMORE: I think the resolution should be offered; I object to the testimony on the ground that this is not the best evidence, and if any Exchange has approved this ordinance, produce the resolutions. It is entirely irrelevant.

By the COURT: The objection is over-ruled.

By Mr. MILLING:

Q. Answer the question?

A. I don't recall ever having seen all of the resolutions passed by the several Exchanges, but I know some resolutions were passed.

Q. Don't you know as a matter of fact just as you testified about the Belt Railroad and cars,—don't you know this in the same way as you know that you heard people say so?

A. No sir, I do not, because when I told you about the Belt Railroad what I told you I know because I am concerned in it.

Q. Are you a member of any of the Exchanges?

A. No sir.

Q. You read the newspapers?

A. Yes sir.

Q. Don't you know as a matter of fact that every newspaper in the City of New Orleans favored the L. R. & N. Ordinance?

By Mr. GILMORE: I object; he can produce the newspapers. If a newspaper supported a proposition the newspaper itself is the proper evidence.

By the COURT: The objection is over-ruled; this witness is now on cross examination.

A. I cannot say that because I do not read every paper in the City, but I know there was a general opinion on the part of the citizens of New Orleans, that is, there appeared to be that they would hail the advent of the L. R. & N., but that was nothing
117 on the face of the earth except an expression on their part, as they said, that they were so anxious to have something done for the City of New Orleans that every railroad that came into it they would be glad to do all they could for it; and this very morning I had evidence of what they did mean when a man told me——

Q. You have seen people before entering into a contract who afterwards regretted that they entered into it?

A. Oh yes, often.

Q. As a matter of fact at the time when the L. R. & N. ordinance was before the City Council, is it not a fact that the Belt Railroad proposition of that ordinance was fully discussed throughout the limits of the City of New Orleans and was not that the principal feature that was discussed?

A. No sir, it was not; the only thing on the face of the earth at that time that gave a desire on the part of the people was the claim that it was a new railroad, which claim was made by Mr. Edenborn that he was building the road out of his individual funds and therefore some consideration ought to be given him.

Q. Wasn't it discussed in connection with the Belt railroad that you would not only get this railroad but that you would have a Belt road built in connection with your road?

A. I say no, sir; in fact the L. R. & N. as I recollect it——

By Mr. RANDOLPH: If your Honor please we will never get through with this unless the witness when he answers the questions stops without going into a long argument.

A. The reason why I am anxious to explain this to the
118 Court is the fact that I have gone through all this matter and what they want to do is to pin me down to one special answer without an explanation.

By Mr. MILLING:

Q. Colonel Hill, you say you were not present at the conference with reference to a compromise of this matter?

A. On the contrary, I said I was; I certainly was in the Mayor's parlor.

Q. What time was that?

A. In 1906, I think in the Summer.

Q. I am speaking of the compromise by which they agreed on the tracks?

A. No sir, I was not there.

Q. You say that nothing was said about compromising this law suit after it was instituted. Are you prepared to stick to that?

A. I didn't say that.

Q. What did you say in reference to it? I misunderstood you and I beg your pardon.

A. What date was the law suit filed?

Q. On June 26th, 1906.

A. That was immediately after this conference if I remember correctly.

Q. Since that time, if I understand you correctly you say there was no effort to compromise?

A. Not to my knowledge; I had not been present with the attorneys at all times when this thing was discussed.

By the COURT: Of your knowledge Colonel?

A. No, sir.

By Mr. GILMORE: We don't contend that there was any conference just preceding this last agreement made in August, 1908, but we most certainly do contend that between June, 1906 and August, 1908, that there were no conferences or any attempt on any one's part to compromise this matter.

By the COURT:

Q. The question that the counsel puts to you Colonel Hill is,—was there any effort to compromise this suit between the time it was filed, June 26th, 1906, and the Summer of 1908?

A. Not that I know of, and if it occurred in the Summer of 1908 I could not have known of it because I left the City on the 4th of July and returned in September.

By Mr. RANDOLPH:

Q. You have been a member of the Board of Commissioners of the Public Belt for several years I understood you to say?

A. Yes sir, from the time of its organization to its present shape.

Q. Of course, you are fully wedded to the idea that your theories are the correct theories for the Belt Commission of the City of New Orleans?

A. Yes sir.

Q. You do know, though, that prior to the advent of the Louisiana Railway & Navigation Company into the City of New Orleans, that the terms of its advent in the City of New Orleans was a matter of wide discussion among the people of the City of New Orleans?

A. Yes, as matters of that kind always are, with any railroad that was proposing to enter the City.

Q. Do you know that it was expressly and generally thought that it should enter the City on its own road?

A. No sir.

Q. Do you mean that the desire was for its road to come here and not to come over its own rails but somebody else's rails?

A. I think that was the case; my recollection is that it was to come into the interior of the City in the back.

Q. Then you know as a matter of fact that that subject occupied a good deal of space in the newspapers, didn't it?

A. I presume it did, but during the Summer I was not present in the City of New Orleans.

Q. Just about the time or prior to the proposed advent of the Louisiana Railway & Navigation Company, the Frisco Road was seeking admission wasn't it?

A. There was an ordinance passed by the City allowing the Frisco to come in.

Q. That was prior to the ordinance of the Louisiana Railroad & Navigation Company?

A. Yes sir.

Q. Now, were not the terms upon which the L. R. & N. should enter the City of New Orleans widely discussed?

A. Yes, I presume they were in the newspapers.

Q. When finally public sentiment crystallized in the ordinance of the City No. 1997?

A. Yes sir.

Q. Well, public sentiment did crystallize into that ordinance didn't it?

A. Not public sentiment.

Q. I ask you whether or not that discussion finally took official form in the adoption of Ordinance 1997?

A. The discussion before the City Council did finally take form in the ordinance No. 1997—

121 Q. And the terms upon which the Frisco should enter the City were expressed in the ordinance already filed in this case No. 1615?

A. I don't know the number.

Q. Well, that is the number. Under both of these ordinances you are aware having read them that it was the desire and policy of both of these roads to reach their terminals in the City of New Orleans over their own tracks for being allowed to operate their trains on tracks called the Belt Railroad tracks?

By Mr. GILMORE: The ordinances speak for themselves.

By Mr. RANDOLPH:

Q. From your familiarity with these ordinances you know it was their desire or purpose to reach the river front by operating their own trains over the Belt tracks; don't you know that was expressed in the ordinance virtually?

A. I was going to say, to the contrary—

Q. From your familiarity with this ordinance you know it was their desire or purpose to reach the river front by operating their own trains over the Belt railroad tracks; don't you know that is expressed in the ordinance virtually. Answer whether I am correct or not?

A. I cannot answer without looking at the ordinance; I have read all of the ordinances connected with these railroads from the time I have had anything to do with the Belt road.

Q. But you are familiar enough Colonel with the ordinance to answer the question that I have asked you?

A. I would not like to say that. You said that I admitted that

public sentiment had crystallized in what was done in the City Council. Now, so far as my view of it is concerned—

122 Q. That is a mere matter of opinion; I just asked you if you would admit that in a representative form of government?

A. My association with those with whom I spoke is that they opposed those ordinances—

By the COURT: At any rate the official action finally resulted in these ordinances?

A. Yes, that is it.

Q. The gist of the whole matter is that the propositions were publicly discussed and finally these ordinances were passed?

A. Yes, by the City Council.

By Mr. RANDOLPH:

Q. I call your attention to paragraph 10 of Section 2 of what is called the Frisco ordinance, subdivision "E", which reads: "That the New Orleans & San Francisco Railroad Company, and all other contributing railroads using the belt line, shall have the right to operate their own locomotives, cars and equipment over the said Public Belt, under the control of The "Public Belt authority", provided that all railroads using said tracks shall belt all cars to and from their respective lines over all switches, spurs and sidings forming part of the Public Belt tracks free of all cost."

Are you not aware that that provision is in the Frisco ordinance?

A. You have read it.

Q. Isn't substantially the same provision in the Louisiana Railway & Navigation Company's ordinance?

123 A. No sir, it is not.

Q. I will read it to you; it is in Section 3 of the defendant's ordinance, subdivision (b) of the Louisiana Railway & Navigation Company's ordinance. It reads: "That in consideration of the payment of the above sum, the Louisiana Railway & Navigation Company shall have the right to operate its own locomotive, cars and equipment over the said Public Belt from the upper limits to Henderson Street, provided that said Company and all railroads using said tracks shall belt all cars to and from their respective lines, over all switches, spurs and sidings forming part of the Public Belt tracks, free of cost."

Isn't that in the ordinance of the Louisiana Railway & Navigation Company, No. 1997?

A. You have read it, and from that I take it to be there.

Q. Now, then, you understand, that it was from those expressions that I read from both of these ordinances that it seemed to be the policy and plans of these two railroads to make provision and have the right to operate their own trains direct with their own locomotives, cars and equipments over this part of the Public Belt road?

A. The ordinances speak what you say I presume.

Q. Your theory is, as you have advanced here, that it is not for the interest of these roads to so operate these trains, and that it can be done cheaper and better by the Belt Railroad Commission?

A. I say it can only be done by the Public Belt railroad when you consider the purpose for which the Public Belt was built, which is to supervise the interests of commerce and the citizens of
 124 New Orleans. I can understand how any railroad company, using our property, can be benefited by doing so, by furthering their purpose and carrying out their own acts.

Q. Your idea is that from your study of the railroad business that these two railroads, the Frisco and the L. R. & N. do not correctly appreciate what their interest is in the matter of running these trains?

A. No sir, I do not.

Q. Your view differs?

A. Yes sir.

Q. Then you admit that it is possible for the interests of this defendant railway to operate its own trains as it is asking here?

A. Yes, it would be to their own interest because——

Q. I don't want your reasons; you have answered my question.

A. I have a right to state my reasons.

By the COURT: Would it be to their financial interest?

A. It depends upon how they act.

By Mr. RANDOLPH:

Q. I ask you this: Is this stipulation in this contract-ordinance, giving them the right to operate their own locomotives, cars and equipment over this Belt railroad an advantage to them, that is, to this particular railroad?

A. I presume they never would have asked for it if they did not suppose so.

Q. Colonel Hill you have spoken of the various railroads accommodated by the Public Belt system; is it not a fact that all of
 125 the railroads entering the City of New Orleans with the exception of the defendant railroad Company have facilities for reaching the river front from their own track or tracks?

A. More or less.

Q. Do you know of a single exception amongst the railroads entering the City of New Orleans that has not a track of its own by which it can reach the river front within the City of New Orleans?

A. All of them reach it, as I recollect.

Q. Has the Louisiana Railway & Navigation Company any tracks of its own by which it can reach the river front from its main track?

A. I think not; that is not below the Parish line of Jefferson.

Q. Is it not a fact that many of the railroads entering here and doing business in the City of New Orleans have their own terminals on the river front?

A. The Louisville & Nashville has a passenger terminal, and further up town a freight terminal; the Northeastern has a freight terminal now, with no extended rights on the river-front,—it reaches the river; the T. & P. has a slight right of way along the river front; and the S. P. have their terminals between Elysian Fields and Girod Streets.

Q. Has the Louisiana Railway & Navigation Company any such tracks along the river front?

A. No sir.

Q. Is it not a fact that some of the railroads have their own private wharves, with grain elevators and large facilities for handling freights that they may bring in for export?

126 A. The Illinois Central has.

Q. Has not the Texas & Pacific docks also on the river front?

A. Not on this side of the river.

Q. At Westwego?

A. Yes sir.

Q. On this side don't they have shipping facilities?

A. They have an incline that brings their cars up on the levee on this side.

Q. These railroads that have these facilities and terminals on the river front it connects them directly with the shipping interests of New Orleans?

A. No sir, it don't.

Q. Take the Illinois Central bringing its trains in from the North and West, don't it carry its own cars to the Stuyvesant docks?

A. Yes sir.

Q. And don't it unload those cars directly into the ship and also from the ship into their own cars?

A. Yes sir.

Q. Using grain elevators?

A. Yes sir, the I. C. has its own elevators.

Q. And they handle their own trains?

A. Yes sir.

Q. Over their own tracks?

A. Yes sir.

Q. Has there been any proposition by the Illinois Central to the Belt Railroad Commission in view, as your theory is, of the supposed economy in handling their locomotives to turn over that business to the Belt Commission instead of doing it themselves?

127 A. That's a long question and I would like to answer so as to have it fully understood.

Q. Has there been any proposition of that sort from the Illinois Central to the Public Belt Commission?

A. There has not.

Q. What mileage has the Illinois Central along the river front?

A. It runs from the Jefferson Parish line to the Stuyvesant Docks.

Q. Speaking generally, what mileage would you say?

A. I would say it has fully seven miles.

Q. And how many tracks?

A. Two coming into the Parish and of course at the Stuyvesant docks they have a number there.

Q. And the Louisville & Nashville, what trackage has it along the river front?

A. It has a large number of tracks distributed; I believe it is in the neighborhood of twenty two tracks.

Q. Is not the Illinois Central one of the largest railroad systems that enters the City of New Orleans?

A. Yes sir.

Q. A very rich and prosperous corporation?

A. Yes sir, and undoubtedly made much richer by reason——

By Mr. MILLING:—

Q. We don't want that; do you know the Willow Grove landing?

A. I don't know it by that name.

Q. The old coal landing?

A. Yes, I know where the coal landing is.

Q. You are acquainted with that location?

A. I pass by it on the railroad.

128 Q. If the Louisiana Railway & Navigation Company had its tracks down there, or could carry out its ordinance, it would be in a position to have the same character of landing on the river front as the Illinois Central has?

A. To the same detriment to the City of New Orleans, yes sir.

Q. I haven't asked you anything about the detriment to the City of New Orleans. Has the Louisiana Railway & Navigation Company any connection with that landing? Have they?

A. My recollection is that the only connection running down to the coal yard was the switch that was run for this dirt contract to build this levee.

Q. There is no connection between Willow Grove landing and the Public Belt track?

A. Yes, we have had a track in that neighborhood.

Q. The question is whether or not the Willow Grove landing has been connected with the Public Belt tracks?

A. There is a Public Belt track running into what is called the coal yard.

By the COURT:

Q. At any rate on that proposition I suppose it is simply a question of putting a spur into it is it not?

A. Yes sir, certainly; I can state as a matter of fact that the course of the Belt Commission has been to oppose every attempt to get a private road along the river front.

By Mr. RANDOLPH: That is not the question before the Court: You have referred to the fact that a letter had been written
129 complimenting the Belt system by the defendant Company here; you referred to that I believe in your testimony, did you not?

A. Yes, Mr. Haddix' letter, is that what you mean?

Q. Yes. Do you know the circumstances under which that letter was written?

A. I do not.

Q. Do you know what complaints preceded that letter as to the service the month before?

A. I told you I heard complaints being made.

Q. You spoke of the Southern Pacific Railroad?

A. Yes sir.

Q. Did you ever hear of complaints from the Louisiana Railway & Navigation Company?

A. I don't recall of any special complaint by the Louisiana Railway & Navigation Company.

By Mr. GILMORE:

Q. Has the Northeastern Railroad Company any private wharf that is not subject to the jurisdiction of the Port Commission on the river front?

A. My understanding is that there is none except the Stuyvesant Docks.

Q. When was the Stuyvesant Docks constructed? Was it prior to the establishment of the public wharf system?

A. It was. Meaning by that that there was a wharf system to serve the commerce of New Orleans in existence prior to the grant to the Stuyvesant docks, and the Dock Board took possession under an Act passed in 1896.

Q. Were not the Stuyvesant docks there before the Public Belt was constructed?

A. Yes, they were.

Q. Was not there a private grant to the Southern Pacific that existed before the Public wharf system of the City of New Orleans was established?

A. Yes sir.

Q. Didn't it expire recently?

A. Yes, in 1900.

By Mr. MILLING: What is the purpose of this?

By Mr. GILMORE: I propose to show that there are a number of railroads on the river front that have no private terminals or wharves, such as the defendant company claim a right to establish.

By Mr. GILMORE:

Q. Col. Hill, did not the Southern Pacific Company maintain a terminal system which expired since the Dock Board took possession of the wharves?

A. Yes sir.

Q. And which has not been renewed?

A. No sir, it has not been renewed.

Q. Is it not a fact that all of the rights of the Texas & Pacific Railroad on the river front have been decreed by the Supreme Court of the United States—

By Mr. MILLING: Now, your Honor, I object—

By Mr. GILMORE: I withdraw the question.

131 HUGH McCLOSKEY, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. GILMORE:

Q. Mr. McCloskey, do you occupy any official position relative to the control of the public wharves of the City of New Orleans?

A. Yes, I am President of the Board of Commissioners of the Port of New Orleans—the Dock Board.

Q. When was that Board created, do you remember?

A. It was in 1896.

Q. And it has been in existence ever since?

A. Yes sir.

Q. It has charge of the entire wharf and landing system of the City of New Orleans?

A. Yes sir, our jurisdiction extends into the parishes of Orleans, Jefferson and St. Bernard.

Q. Will you state what railroads used the wharves subject to the Port Commission's jurisdiction, and what railroads do not?

A. The only railroad which has been exempt from our jurisdiction is that commonly known as the Stuyvesant Docks.

Q. Was the Stuyvesant dock grant made before your Commission took charge of the wharf system?

A. Yes sir.

Q. Has there ever been a private grant made to any railroad Company to maintain private terminals and wharf switches along the river front in the City of New Orleans since the public wharf system of the State was established?

132 A. No, sir, the public wharves have a public belt railroad system track connection.

Q. The Port Commission has approved every demand of the Public Belt to reach all the public wharves under your jurisdiction?

A. Yes, sir, under certain terms and conditions.

Q. You know of your own knowledge what the present physical condition of the Public Belt system is in so far as construction is concerned, do you not?

A. Yes, sir; I believe that their facilities are improving monthly.

Q. What relations do you consider that the Public Belt system bears to the public wharf system of the State of Louisiana?

By Mr. MILLING: What is the object of that?

By Mr. GILMORE: The same object as on yesterday,—to show the absolute necessity for the operation of this public belt as an independent line for the wharf system of the State of Louisiana.

By Mr. MILLING: Objected to on the ground that there is no connection between the public belt and the Port Commission, if, however, the Court considers that there is an issue the witness can describe it, and it is then for the Court to determine what their relations are. In other words it is a matter of opinion of the witness if he attempts to give it or define it.

By the COURT: The objection is over-ruled.

A. I think it is an absolute necessity to have a Public Belt railroad that can reach all wharves under our jurisdiction on an
133 equal basis; and that cannot be had were we to depend upon the different railroads centering here for that purpose.

Q. You were acquainted with the nature of the proposed grant that was made at one time by the Council of the City of New Orleans to the New Orleans & San Francisco Railroad, and one of the conditions were that the defendants so it is claimed were granted the

privilege to construct a so called Belt Railroad on the river front; you remember that grant do you not?

A. I don't remember the particulars of it. But the authority given to the Public Belt Railroad Commission to construct its own tracks in the territory where we have jurisdiction is such that it prohibits them under any conditions to allow——

By Mr. MILLING: Objected to because the ordinances have been introduced in evidence and they are the best evidence under which the Public Belt system goes over the property under the jurisdiction of the Port Commission.

By Mr. GILMORE:

Q. In so far as your Commission is concerned, what would be the effect upon the Public Belt system of New Orleans of the operation of the trains of private trunk lines over the public belt tracks?

A. We believe it is very detrimental to the public wharf system.

Q. Would it not be in violation of the agreement between the Port Commission and the Public Belt?

A. Absolutely so.

By Mr. MILLING: If your Honor please we object to the last question as going into the very matter which was objected to a few minutes ago. The ordinances are here, and the Court can determine what would be in violation of them.

By the COURT: The objection is good. I am allowing you to go very far in the matter of showing the whole situation on the river front, and at the same time we have to deal with the rights of the parties and not with the views and wishes of the different boards.

By Mr. GILMORE:

Q. Has the Northeastern a terminal wharf under your jurisdiction?

A. Yes, sir, and we collect all dues as they enter and as with any other wharf or vessels landing there.

Q. Has the Southern Pacific a wharf where all its New York steamship business and export trade is conducted under your jurisdiction?

A. Yes, sir.

Q. Is the through trade of the Illinois Central Railroad carried on over the fruit wharves on the river front of the City of New Orleans under your jurisdiction?

A. Yes, sir.

Q. Is there any railroad operating any terminal or grain elevator except the I. C. at Stuyvesant Docks?

A. No, sir.

Q. Is it possible by the tracks of the Illinois Central, its own tracks, to reach the entire river front, or are the tracks of the I. C. only incidental to the Stuyvesant docks?

A. The business at Stuyvesant Docks we can only handle their business that comes over their own railroads.

135 Q. Have exporters of the City of New Orleans a general right to do business over Stuyvesant Docks?

A. No, sir, we as shippers cannot ship anything over Stuyvesant Docks unless it comes into that point over their system.

Q. Has your Board in contemplation the construction of any public wharf facility for the lumber trade?

A. Yes, sir; it has had that under consideration for a long time and about (witness refers to memoranda) the 25th we adopted a resolution extending the public wharf system, that is, in 1908, and in April, we approved the plans for an extension of four thousand feet of wharf to extend up stream above Napoleon Avenue, and that has been intended for a lumber wharf, and it would have been constructed earlier if the funds had been available for it.

Q. Are the funds now available for it?

A. No, sir.

Q. With the bonds that you have sold and those you will sell?

A. Yes, it will then.

Q. Has not the lumber business of the City of New Orleans been personally handled over the public wharves partially and through the public belt system?

A. Yes, sir.

Q. Has the Southern Pacific grant expired since the establishment of the public wharf system?

A. Yes, sir.

Q. Was application made for a renewal of that grant?

A. The Southern Pacific has an arrangement with us revocable at our pleasure on certain notification at a rental of ten thousand dollars a year for a lading for the transfer boat that they had before at Elysian Fields Street.

136 Q. Was it not first suggested by the Southern Pacific that their grant should be renewed for twenty years?

A. Yes, sir.

Q. That was denied?

A. Yes, sir, and we don't give any grants for any specified time unless under such restriction that they are revocable at our pleasure or within a specified time.

Q. What would be your position as President of the Port Commission with regard to the construction of a private wharf at Octavia Street for the defendant Company?

By Mr. MILLING: We object to that. What possible effect could it have if they did oppose it?

By Mr. GILMORE: Because it is under the jurisdiction of the Port Commission.

By Mr. GILMORE:

Q. Would there be any necessity for action on the part of the Port Commission to obtain possession of any private wharf, built at Octavia Street?

By Mr. MILLING: Objected to for the same reason.

By the COURT: That can be gathered from the Statutes I should imagine; the objection is maintained.

By Mr. GILMORE: I reserve a bill of exceptions.

137 Cross-examination by Mr. MILLING:

Q. Then, if I understand you Mr. McCloskey, you have no lumber wharves or grain elevators in the City of New Orleans?

A. All our wharves are available for lumber or any other commodity outside of bulk grain. Mayor Behrman *was* in the last forty days *days* wrote to me that they could bring five hundred and twenty-five million feet of lumber through here for a specific purpose—

By Mr. MILLING: We object to what Mayor Behrman wrote him; we did not ask him that.

By the COURT: I think he should go on.

A. I can give you the Mayor's letter; the Mayor as I remember it right wrote that they had an opportunity for a large amount of lumber passing through this port, and the question was asked could the Port Commission provide for it. We answered him Yes, and the results were that we were correct in our calculation because we did provide for it.

By Mr. MILLING:

Q. How much did you provide for?

A. I am not positive but I can tell you what they asked for, 525,000 feet.

Q. You said million a moment ago; are you not afraid that would over run your wharves?

A. I don't know the object of the communication, but there has not been up to the present time any commodity of any kind that we have not been able to take care of.

Q. I asked you if it was not in small quantities that you handled lumber, and you gave me a statement of Mayor Behrman's writing, about 525,000 feet. Now, will you tell me how many car loads of lumber that is?

138 A. I am not in the lumber business.

Q. You don't know whether your facilities are good or bad for handling lumber?

A. I believe that our facilities up to the present time have been such as to enable us to take care of all lumber that has come here up to the present time.

Q. You used to get some lumber before you had the Public Belt system? What I am speaking of is if you are in a position to know or are you sufficiently acquainted with the lumber business to know what the facilities are for handling lumber on the wharves here?

A. The facts are that we have been able to take care of all of the lumber shipped.

Q. How many cars have you shipped per day?

A. I have no idea.

Q. Do you reckon that you handle the output of one mill getting fifty thousand feet a day?

A. I don't know.

Q. Don't you know that the principal lumber that has been shipped through this port has been over the Southern Pacific shipped from Algiers?

A. I don't know that.

Q. Is it not a fact that the Southern Pacific has its own private lumber wharf and its own private facilities for loading lumber from its cars into the ships at Algiers?

A. I don't know that; I do know that the movement of the general freight business from Algiers, where it is absolutely free, with no dues on it, to this side of the river, under the jurisdiction of the Dock Board.

Q. That was through freight?

A. All freights for New York steamers land on the other
139 side of the river.

Q. Does it bring its lumber across the river?

A. I can't answer that, but we have a man on the front who can answer those questions better than me.

Q. Where does the Southern Pacific load its lumber?

A. I have no idea.

By the COURT:

A. As a matter of fact do any of the Southern Pacific steamships land in Algiers?

A. Not that I know of.

By Mr. MILLING:

Q. Don't you know as a matter of fact that they don't land there?

A. No, sir, there is no steamer that comes to the Southern Pacific for commercial purposes that lands at Algiers.

Q. Don't you know as a matter of fact that the Southern Pacific handles the bulk of the cypress lumber that is manufactured for a hundred and fifty miles west of New Orleans over its own road and ships it from its Algiers wharves?

A. As a matter of fact I don't know it.

Q. Then if it is a fact that the Southern Pacific does handle the cypress lumber for a hundred or a hundred and fifty miles west of New Orleans over its tracks to New Orleans, and transfers it into ships bound for the Atlantic Coast and other ports, then you are not familiar with the conditions with reference to the shipping of lumber in New Orleans, are you?

A. Only in so far as they pertain to the public wharf system.

140 Q. Is not Algiers under your jurisdiction? Is it not part of the City of New Orleans?

A. Yes, but we have exercised no authority over it yet.

Q. Haven't you some authority under the acts of the Legislature to exercise your jurisdiction over that portion of the City of New Orleans known as Algiers as you have in the City of New Orleans proper?

A. Yes sir.

Q. And you haven't exercised it and you do not even know what facilities are there for the purpose of exporting freights, do you?

A. I know there is no facilities there in so far as they have been installed by the Port Commission.

Q. You have already testified that the Illinois Central was the

only road that had a private wharf or private landing on the river front. Is it not a fact that the Southern Pacific has private wharves of its own in the City of New Orleans in that portion known as Algiers?

A. Is it a fact?

Q. Yes?

A. If they have they have been constructed before the Port Commission came into office.

Q. Then your theory is that all wharves or landings that existed at the time or before the passage of the act of the Legislature creating the Port Commission are still private property and private wharves; is that your theory?

A. The constitution provides for that.

Q. Don't you know that as a matter of fact that the property owned by the Louisiana Railway & Navigation Company, the Willow Grove, the coal landing, was a private wharf used
141 at that time for landing coal, and had been for a number of years prior to the establishment of the Port Commission?

A. I don't know of any wharves constructed up in that territory. I believe that has been recognized as a coal landing or for coal barges for quite a long time.

Q. I don't mean that the Port Commission has established or built a wharf; but you have answered the question. Now, take the Southern Pacific on this side of the river proper in the City of New Orleans proper; it has an old passenger depot and also some freight facilities on the river front, hasn't the Southern Pacific.

A. At what point?

Q. Near Esplanade Street?

A. Those facilities have been granted by the Dock Board under certain terms and conditions.

Q. Did it not have those facilities there long prior to the adoption of the act creating the dock Board?

A. I understand that they have the privilege from the City of New Orleans, which expired during the present year and which we gave them the right to utilize under certain terms and conditions which can be proven by the resolutions and agreements entered into.

Q. Is it not a fact that the Southern Pacific had a track along the river front, from that point up the river some distance, before the passage of the act creating the Dock Board?

A. Yes sir.

Q. Is it not a fact that there has been some exchange of tracks between the Southern Pacific and the Public Belt?

A. I cannot answer that question positively; but I understand down in that territory there was congestion on account of which they made some changes.
142

Q. As a matter of fact don't the Southern Pacific run over the wharves that you have specially set aside?

A. No sir; I think there is some joint arrangement which was made for a switch between the Southern Pacific and the Public Belt; that was owing to the fact that the Port Commission has only one

object in view, and that is reducing Port charges, and as the Southern Pacific steamers bring in large quantities of products to go through here the privilege was granted to them to have their cars put there to take through business, that being the privilege of the Belt railroad because we considered it as through freight.

Q. In other words they have got a switch that takes them into the wharf that you have set aside for them?

A. They have a joint arrangement for that switch.

Q. They have a joint arrangement for that switch with the Public Belt?

A. Yes, revocable at our pleasure. But that don't apply to any joint arrangement with any other main track; that is merely for the operation of a switch.

Q. How long does that switch extend? From what point to what point?

A. I can't tell you.

Q. I mean along the river; tell us from what point to what point?

A. I think it commences at St. Louis Street and extends down; it may extend six or nine hundred feet; I think the switch along the wharf which they are utilizing under that joint privilege was given to facilitate through freight.

143 Q. Why the necessity of having a joint arrangement there to facilitate the handling of through freight?

A. Because we realize that the Belt Railroad would impose a tax on that through freight if they handled it with their equipment.

Q. And therefore you fixed it so with the Southern Pacific would not pay two dollars on their cars?

A. Yes, for through freight.

Q. With the arrangement they have the Southern Pacific takes its own equipment and places its own freight there this way, and you handle it in this way?

A. I am not prepared to say.

Q. You know that they don't have to pay two dollars a car and that it is operated so that they don't pay two dollars a car?

A. I know the intention was that there would be no increase tax put on through business.

Q. Of course you are interested in the City of New Orleans and also in Louisiana, and I suppose you are acquainted with the geography of Louisiana and know that there is a vast area extending through North Louisiana and Arkansas that would be a very desirable business to have, that is, to have lumber from that region exported through the City of New Orleans would it not?

A. Yes, sir and to show our anxiety to do so the Port Commission over two years ago had Captain Hinto come before the Dock Board with a request that we establish a lumber wharf above Louisiana Avenue and we agreed to do so if they would give us the proper assistance as the other people did, such as the Southern Pacific and the Leyland Line and the United Fruit Company, where

144 they advanced us money free of interest to make the improvements necessary to give increased facilities to a particular point, wherever we located it. We told these gentlemen that if

they would furnish the lumber we would build a wharf and reimburse them on the same basis as the others, twenty five per cent of the monthly revenue derived for the use of that wharf or sooner if we were able to sell the bonds for that purpose and the wharf Board is alive to increasing the wharf facilities not only for lumber alone.

Q. You will admit that the competition in the sale of lumber is for shipment?

A. You have got me on something now that I don't know anything about.

Q. If it was necessary for the Southern Pacific to be able to handle its freight free of this tax of two dollars a car do you not consider it would be necessary to make some arrangement by which export lumber could be handled in the same way, that is, run into the wharves and transferred without paying two dollars a car?

A. You must understand that the Southern Pacific pays all other wharf dues on that vessel and cargo that comes here. They pay the regular charges imposed by the Dock Board, the same as all vessels landing at that wharf.

Q. I am speaking of the two dollars a car that the Southern Pacific saves on those cars; I say, do you not consider that it would be necessary or at least advisable if some arrangement could be made by which that two dollars a car could be saved on export lumber?

A. I would like to see it saved on all shipments of every character.

145 Q. You know where Hattiesburg is. You know where the G. & S. crosses the Northeastern, don't you? You know about the point where this Gulf & Ship Island crossed the Northeastern, don't you?

A. No, I don't.

Q. I put this hypothetical case to you; suppose they cross each other at about an equal distance from New Orleans and Gulfport would not that lumber necessarily come to Gulfport if there is an extra tax of two dollars a car placed upon it here at New Orleans?

A. I don't think so.

Q. You think that they would prefer to come to New Orleans even if there was a tax of two dollars extra?

A. Of course, for the reason that there is no comparison between the shipping facilities of New Orleans and Gulfport. Ships coming here bring cargo for the Western portion of the country.

Q. Why is it not that lumber from that Section of Mississippi which you know is one of the finest pine areas or regions should come to New Orleans instead of going to Gulfport?

A. If I am to believe the results of the investigation of the Port Investigation Commission, who investigated matters pertaining to this, I would say it is owing to freight discriminations against the Port of New Orleans.

Q. Have you ever been to Gulfport and seen the facilities there for loading cars into ships?

A. I think they are very good; as good as Galveston.

Q. Have you any such facilities here as to be able to run a train

load of cars down to the pier or into the ship's side and have it immediately transferred from the cars into the ships?

146 A. What do you mean by a train load?

Q. You know what I mean by a train load.

A. I don't know how many cars constitute a train.

Q. It may be fifteen or thirty, owing to the size of the engine?

A. I don't know to what extent the switch tracks are, or the length of them on the different wharves, but I know that we have switches to reach all of the public wharves, but the number of cars that can be placed upon them I can't say.

Q. You are President of the Port Commission and not able to give us that information?

A. I'm not operating the Belt road.

Q. Do you know anything about the facilities at Port Arthur?

A. No. I have never been out there or at Galveston either.

Q. Will you admit this fact—

A. No. I'll admit only what I know.

Q. I mean, will you not admit that they have facilities to handle a derrick that will pick the lumber up with grappling hooks out of the cars and put it into the ship, which are far superior to any facilities that you have in the City of New Orleans for handling Lumber?

A. There is no reason why they could not be installed on the Public wharf system.

Q. That is not the question. The question is whether or not you have such facilities now?

A. I don't construe that under the act creating this Board that we are to furnish loading facilities. The Southern Pacific have facilities.

147 Q. Is it not a fact that you get no lumber from the State of Mississippi in the territory that is tapped by the Gulf & Ship Island Railroad which runs to Gulfport?

A. I can't tell you where one foot of lumber that is handled over our wharves come from.

Q. What are your functions with reference to the Port Commission Mr. McCloskey?

A. The Act speaks for itself.

Q. Then what do you do under the act?

A. Carry its provisions out into effect.

Q. But as a matter of fact what do you do?

A. We claim to carry the act out as written and as we are authorized.

By the COURT:

Q. Do you do anything more than build the wharves and sheds on it?

A. We build the wharves and sheds; we designate the locations for handling business; we impose certain charges; we have patrolmen who look after the property on the wharves under our jurisdiction night and day and such other things which are too numerous for me to mention. Under the act of course we are not the people

who are carrying on business; we have got a Superintendent and employés to do that under our authority.

Q. Have you Mr. McCloskey any loading and unloading facilities for the different commodities; for instance such a thing as grain elevators; such a thing as Mr. Milling has spoken of for lumber anywhere on your public wharves?

A. No sir; we have no authority to install such equipment out of the funds derived from the revenues of the general commerce of the Port.

148 By Mr. MILLING:

Q. Then how do you propose to ever make this a port for the exportation of grain or lumber if you have no such authority?

A. The man who exports grain can export as easily from the public wharves as he could from the front because he can buy property in the rear of the wharves which would be as close as the Illinois Central elevators are and others doing business on the front.

Q. In other words you are going to put him out of town?

A. Put him no further than the Illinois Central has established its elevators.

Q. Is there anything between the Illinois Central elevators and the river?

A. Yes sir, there is.

Q. Is there any private property or any property under the control of any one else other than under the control of the railroad Company?

A. I think not.

Q. Of course, if a man got a permit to do so, he might build an elevator in the middle of the City?

A. That would not be necessary. Where you gentlemen are applying for this privilege I understand you own the property and all you have to do is to get the Dock Board to build wharves and you will have the same privilege as the others.

Q. But we would have to build the grain elevators?

A. Yes sir.

Q. With permission from you?

A. Yes sir.

Q. Your authority extends through the Parish of Jefferson also?

149 A. Yes sir; of course the construction of our thought in the light of that would appear to me that these legal minds would be better judges of that than we.

Q. Don't you gentlemen contend that your authority extends over the river front in the Parish of Jefferson as well as over the river front in the Parish of Orleans?

A. Yes, and we are confirmed in that conclusion when people who wanted freight wharves in the Parishes of Jefferson and St. Bernard, have come before us and got that authority.

Q. Is it not a fact that the Texas & Pacific Railroad have private elevators in the Parish of Jefferson right on the river front?

A. I believe they were there before we took charge and we have

not made any effort to disturb the conditions as they existed, but we intend to see that all parties shall be put on an equal basis in so far as our jurisdiction is concerned.

Q. Isn't it a fact that the Illinois Central & Texas & Pacific have exclusive privileges on the river front for grain elevators?

A. The Illinois Central has got privileges through the Constitution of the State.

Q. Isn't it a fact that the Illinois Central and the Texas & Pacific have exclusive privileges on the river front under the jurisdiction of the Port Commission, I mean that portion of the territory under the jurisdiction of the Port Commission?

A. The territory of the Stuyvesant Docks has been eliminated from the jurisdiction of the Port Commission.

150 Q. Has the territory at Westwego, where the Texas & Pacific have their terminal facilities and grain elevators been eliminated from the jurisdiction of the Port Commission?

A. I don't know what their franchises call for. I want to correct my testimony, where Mr. Milling asked me if we could handle solid trains at the public wharves. I say Yes, we handle solid banana trains from the United Fruit landing.

Q. And you have special facilities for handling the banana trade don't you?

A. Yes; of course we allowed them to construct their elevators there for unloading bananas, and which we would allow anybody who could show that it was a benefit to the Port.

Q. Haven't you given the Southern Pacific an exclusive wharf?

A. No sir; there is no wharf under our jurisdiction exclusively where any one has a preference right while under us.

Q. Isn't it a fact that that is the only railroad company that handles freight at that wharf of the Southern Pacific Company?

A. I can't say that for the reason that our Superintendent's instructions is to take any wharf, and I think our records will show that, that it is required for any other steamer to land there, and when it is not in use they have the privilege of landing then and they have no more exclusive right in the Harrison line or the Leyland line. We always designate a landing for Steamers giving them preference to that landing. The great objection has

151 been that we have not had facilities for accumulating cargo, and we are giving them that now.

Q. I want to know whether the Southern Pacific has not the exclusive or at least a preference right at a particular wharf in the City of New Orleans?

A. Yes, and all other regular liners have the same thing.

Q. Has the Louisville and Nashville a wharf upon which it has a preference above all others?

A. No sir, the Louisville & Nashville has a small wharf; I don't know whether it is one hundred or two hundred feet, which appears in the original grant allowed to them, and we have not made any effort to interfere with that allotment.

Q. Then it is a fact that they are using their own wharf?

A. No, sir, no freight is unloaded on that wharf unless it is intended for a steamer.

Q. Is it not regarded as the wharf of the Louisville & Nashville?

A. We use that wharf almost continuously ourselves and it is not regarded as the Louisville & Nashville wharf.

Q. Have they surrendered their rights on that wharf?

A. No sir; in fact the wharf is not of such dimensions as to accommodate a steamer.

Q. Are they in possession of the wharf?

A. Yes sir.

Q. And they hold it under their original grant?

A. We haven't interfered with them in any manner; I don't know what grant they are holding it under but they are there.

Q. Has the Northeastern Railroad Company a preference at any particular wharf?

152 A. Yes; just like the Illinois Central has a preference at the fruit wharf. Just like we give a preference to regular lines, and if a few gentlemen want a preference on any particular wharf we will grant it.

Q. Does the Illinois Central pay belting charges to the Public Belt Railroad?

A. I don't know.

Q. Do they get to their freight wharf over the Public Belt Railroad?

A. No sir, they get there over the Public Belt which is constructed on St. Joseph Street; that is a legal question.

Q. What Belt road is that?

A. The Illinois Central; I think it was known as the Schreiber belt.

Q. And the Illinois Central is in possession of it isn't it?

A. Yes, through St. Joseph Street to the river.

Q. Then the Illinois Central not only reaches the Stuyvesant Docks over its own tracks but it also reaches the fruit wharf, isn't that a fact?

A. Yes, sir.

Q. Can you think of any other railroad that reaches these wharves over their own tracks besides the Illinois Central and the Louisville & Nashville?

A. The Texas & Pacific has a transfer up there, and I suppose you are familiar with the fact that the Dock Board has been enjoined in the United States Court from making improvements up there owing to the fact that the Texas & Pacific say it was encroaching on their territory?

Q. What wharf does the Texas & Pacific use?

153 A. None but this wharf for the transfer of boats.

Q. And their freight terminals on the other side of the river?

A. Yes, and they have their own private property where they handle their freight out of the jurisdiction of the Dock Board.

Q. I believe Chalmette is under your jurisdiction?

A. Yes sir.

Q. The Dock Board didn't build those wharves?

A. No sir they were built before we came into office.

Q. Is it not a fact that they have been rebuilt and extended to a very great extent since the Dock Board took charge?

A. What do you mean?

Q. I mean the terminal facilities?

A. The slip has been rebuilt but I do not think that the other wharves were rebuilt since we took charge.

Q. You don't know anything about the operation of the Public Belt Railroad?

A. No sir.

By Mr. GILMORE:

Q. There is a Southern Pacific switch track at the Southern Pacific wharves?

A. Yes sir.

Q. At whose expense was that track built?

A. The Southern Pacific Company.

Q. Has the Southern Pacific Company been given a joint grant and the joint use of that track of the Belt Railroad Company?

A. Yes, sir.

154 Q. Is that grant revocable?

A. Yes sir, it is revocable at our pleasure; the Southern Pacific pays ten thousand dollars a year and we have to give them a certain notice; I think it is eighteen months, so that we cannot take any snap judgment in making them move.

Q. Is it not a fact that the Southern Pacific operate their own line of steamers?

A. Yes sir.

Q. The proposed lumber wharf for which your Dock Board has made plans,—is that for the accommodation of one or all of the railroads?

A. That is for the accommodation of all corporations.

Q. If a public wharf be built for lumber, would that be for the accommodation of a private concern or for all persons?

A. My experience is that the railroads want to monopolize business for their own plans.

Q. If a mechanical contrivance is necessary for any particular purpose for mixed trade or lumber are they not provided by the parties desiring them with the consent of the Dock Board?

A. Yes sir.

Q. Are they not in existence at the freight wharf of the Illinois Central?

A. Yes sir, and further Captain Oreilly has an equipment for loading steamboats.

Q. If your Commission should build a wharf for lumber purposes at Octavia Street who would pay for the wharf?

A. The Dock Commission.

155 Q. Would it cost the Louisiana Railway & Navigation Company one cent?

A. No sir.

Q. Would there be any possibility in the world if a public wharf was constructed at Octavia Street for lumber on similar conditions as the Southern Pacific with a grant to the Louisiana Railway & Navigation Company, would there be any possible objection to giving the Louisiana Railway & Navigation Company the same kind of switch rights and preference wharf rights as are given to the Southern Pacific at Esplanade Street?

By Mr. MILLING: We object to the question because the witness cannot bind the Board; it is a mere matter of opinion of his; if he can do *as* we would like to get it in writing.

By the COURT:

Q. Mr. McCloskey, I understand that you are speaking of giving preferential rights on the wharves, and when you are speaking of that you are speaknig of giving preferential rights to Steamship companies and not to railroads?

A. Yes sir, steamship companies only.

Q. In other words in order to accumulate freight a regular liner must go to a certain wharf and find her freight there?

A. Yes sir.

Q. You do not mean that any particular railroad is permitted to come there and take all of the freight that is landed at a particular wharf; in other words that preference is given to a steamship and not a railroad?

156 A. I can prove it by the action of the Board, so I can talk for the Board in this instance. Application was made by the Frisco at the head of Market street. They claim that they owned property in the rear; we took action and gave them that right when they had steamers in commission at that wharf that we would give them a preference right over that wharf as much as anybody else.

Q. I understand that the question of preference relates exclusively to steamers?

A. Yes sir.

By Mr. GILMORE:

Q. Supposing a railroad bringing in a large quantity of freight wanted to deliver it to certain steamers that would take it there wouldn't you make an arrangement with any steamship to have a preference right in order to receive all of the freight for that line?

A. Yes, of course; if a railroad says we have quite a quantity of freight coming here for a steamer we will designate some point that it can be taken care of after application is made.

Q. But if a railroad company ask for a preference right stating to you that a certain number of vessels will come here for freight will you give them that right?

A. Yes, certainly.

By Mr. MILLING:

Q. That is a preference given to the Southern Pacific over a switch along the river front at the landing or wharf?

A. No sir.

157 Q. Then I misunderstood you?

A. I said that I believed that the Southern Pacific and the Belt road had entered into an arrangement for joint operation of that particular switch so they could get through freight.

Q. That switch is on Dock Board property?

A. Yes sir.

Q. And it required the consent of the Dock Board to put it there?

A. Yes, revocable at our pleasure.

Q. Is there any other railroad permitted to use its engines and cars upon that switch except the Belt and the Southern Pacific?

A. Not with our authority.

Q. Well, they would have to have your authority to get there would not they?

A. Yes, unless they did it unknown to us.

Captain E. L. COPE, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. GILMORE:

Q. Captain, what is your official position with the Port Commission?

A. I am superintendent of the Board of Commissioners of the Port of New Orleans.

Q. Do you know anything about facilities for handling the lumber traffic of the City of New Orleans?

158 A. Yes, I know we have facilities to handle all cargoes.

Q. Have you had any difficulty so far in handling cargoes of lumber and other freight that have been offered for shipment on the wharves of the City of New Orleans?

A. No, sir, we have handled all freight——

By Mr. MILLING: Objected to as leading and suggestive.

By Mr. GILMORE:

Q. Just state to the Court,—you know the whole subject matter,—what the Port Commission facilities are for handling lumber, and what has been the practice in past years and what is in contemplation?

A. The Port Commission with the present facilities has been able to offer facilities for all lumber brought to the City of New Orleans.

By Mr. RANDOLPH: There is no question here as to what the facilities of the Port Commission are; it is a question of our right vel non to go over this Belt Railroad line with our own equipment and the way that this matter came up incidentally was the position taken by the Belt road that they could do it cheaper than we could ourselves with our own equipment.

By Mr. GILMORE: Our position is that it is impossible to allow the Belt railroad tracks to be used for the private use of trunk line railway companies and maintain an efficient Public Belt Rail-

road system, and we endeavored and did show that this Belt system was part of a great wharf system of this State.

By the COURT: I think the objection is good.

159 By Mr. GILMORE: We reserve a bill of exceptions.

By Mr. GILMORE:

Q. Captain Cope, can a Public Belt Railroad system, as devised and constructed be operated as a proper adjunct to the public wharf system of the City of New Orleans if private railroads are allowed to run their locomotives over the Public Belt tracks?

By Mr. MILLING: We object for the reason that it injects into the question a joint arrangement between the Belt and the wharves, and I understand that the issue is confined to the question of operating trains over the Belt Railroad, and I interpose the further objection that this witness has not been shown to be an expert on the running or operating of trains upon railroads.

By the COURT: The second objection is good; not the first; because the Court will take cognizance of the fact that the Belt Road is part of the Dock system, practically the only *raison d'être*.

By Mr. GILMORE: I reserve a bill of exceptions.

By Mr. GILMORE:

Q. Do you know anything about the operation of the Public Belt Railroad? Have you seen it in operation?

A. Yes, I see it every day in operation and I have seen it since it has been in existence.

Q. Are you familiar with the construction and operation?

A. I am not familiar with the construction, but I am pretty familiar with its effect on the delivery of cargo at the different wharves.

160 Q. Do they handle trains over the Public Belt?

A. Yes sir.

Q. Would it be possible from your knowledge of the Belt railroad after seeing it in operation every day, and knowing what wharf connections it has, to operate that Belt Railroad over the wharves if other railroads are permitted to run their trains over the Belt tracks.

By Mr. MILLING: We object for the reason that this witness has not been shown to be an expert or a practical railroad man.

By the COURT: That will be expert testimony. Captain Cope may have an idea; the objection is well taken.

By Mr. GILMORE: I reserve a bill of exceptions.

HAMPTON REYNOLDS, recalled.

By Mr. GILMORE: You gentlemen wanted from Mr. Reynolds certain data?

By Mr. RANDOLPH: Yes, the cost of the Belt from Audubon Park to Henderson Street?

A. I intended to get those costs to-day but I have not had time to get them; there is a numerous amount of detail and data; those

records are there; but I think the Court would be more fully informed if we got a report from the records. I undertook to do it this morning, but it will require going over a good many records to get that data, and I was not satisfied without going over the books and accounts.

161 By Mr. GILMORE: I would suggest that Mr. Joubert, the Secretary of the Belt Commission get all of the data that you gentlemen desire.

By the COURT: What you want from Mr. Reynolds is simply the cost of the building of this track from the upper line of Audubon Park to Toledano Street, and secondly from Toledano Street to Henderson Street.

By Mr. RANDOLPH: That is all we want.

By Mr. GILMORE: I asked him yesterday for a statement of the amount of business over the Public Belt.

By the COURT: Mr. Randolph is not asking for that.

By Mr. GILMORE: Yes, but Mr. Reynolds suggests that these figures will not be correct without going through the record.

By the COURT: Mr. Reynolds cannot give that information, and he is under no obligation to give it if he does not see fit to do it. If you think you can get it to-morrow morning say so.

A. There was a double track and one portion constructed at one time and another at another time; besides this there were a great many switches, and the question which arises in my mind is what is the sum total.

By Mr. RANDOLPH: The total between the North boundary between Audubon Park and Toledano Street and Toledano and Henderson Street.

A. Of both main line and switches?

Q. Yes? That involves the cost of the rails and ties and expense of putting them down and the cost of supervision of the construction?

A. I want to explain that I have not been connected with 162 the Belt Railroad for nearly two years.

By the COURT: I understand that you can give it to us to-morrow morning? And if not counsel will have to get some one else to get it for them.

A. F. BARTLEY, who being first duly sworn by the Minute Clerk, testified as follows:

Direct examination by Mr. GILMORE:

Q. What position do you occupy with the Public Belt Commission?

A. Assistant Engineer.

Q. Has any plan been made of the Public Belt Railroad system?

A. Yes sir.

Q. I mean the construction of this Public Belt system?

A. Yes, sir.

Q. What maps are those that you have in your hands?

A. They are maps showing the Belt Railroad from Henderson Street to Louisiana Avenue.

Q. By whose authority were those maps prepared?

A. They were prepared by authority of Mr. Reynolds first and additions were put on afterwards.

Q. By what authority was it prepared?

A. By the Belt Commission of the City of New Orleans.

By Mr. GILMORE: Counsel for the Mayor offers, produces and files in evidence map marked A. 16.

By Mr. GILMORE: Mr. Bartley have you a map showing the entire Public Belt Railroad?

A. Yes, sir.

163 By the COURT: This map which you mark A 16 runs from Louisiana Avenue to Henderson Street?

A. Yes sir.

By Mr. GILMORE:

Q. Mr. Bartley have you a map showing the territory from Henderson Street up to the upper Parish line?

A. Yes, sir; these four maps take in all of the territory from Henderson Street up to the upper Parish line.

By Mr. GILMORE: Counsel for the Mayor offers, produces and asks to be filed in evidence the maps produced by the witness which are now marked A 17 A 18, A 19 and A 20.

By Mr. GILMORE:

Q. Have you any map of the constructed Belt Railroad below Henderson Street down to the lower terminal?

A. Not here.

Q. Would you be kind enough to present one to-morrow?

A. Yes sir.

Agreement: It is agreed by and between counsel, for plaintiff and defendant that all maps and documents filed in evidence by either the plaintiff or the defendant in the event of an appeal, the original shall be placed in the transcript without the necessity of copying the same.

NOTE: The further hearing of testimony in this cause was continued to Thursday morning, March 25th, 1909.

164 THURSDAY, *March 25th, 1909.*

This cause came on this day for further testimony.

Present: The Hon. John St. Paul, Judge, and all parties in interest represented by counsel.

JAMES W. PORCH, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. GILMORE:

Q. Mr. Porch, do you occupy any official position with the Public Belt Railroad Commission of the City of New Orleans?

A. Yes, I am President pro tem of the Public Belt Commission.

Q. How long have you been connected with the Public Belt Commission?

A. Ever since its organization.

Q. Are you familiar with the history of the Public Belt Railroad?

A. I am.

By Mr. MILLING: We urge the same objection- to this evidence as were urged to similar evidence of other witnesses on the same point.

By the COURT: The Court makes the same ruling.

By Mr. MILLING: We reserve our bill of exceptions.

By Mr. GILMORE:

Q. Mr. Porch, what is the present physical condition of the Public Belt Railroad as to its construction and operation?

A. The Public Belt Railroad is constructed from the Parish 165 of Jefferson down to Kentucky Street, most of the way there is a double track and siding facilities; it is being operated with five engines, under the control of the City of New Orleans, by an ordinance creating the Commission, and we have occupied all of the available space for the main line and such sidings as we have; but we have insufficient siding room at present.

Q. What is the character of the track between Henderson Street and the upper Parish line? Is it single or double?

A. A double track.

Q. Are there any connections between the public wharves and the Public Belt Railroad system?

A. Yes sir, every public wharf in the City of New Orleans is connected as closely as practicable with the sidings and main line of the Public Belt Railroad track.

Q. Is it proposed to make connections with all of the new public wharves to be constructed?

A. Yes sir, now and hereafter to be constructed.

Q. Is the Public Belt railroad connected with any industry along the river front?

A. Yes sir, it is, and it is being connected with more as rapidly as we can reach them; the idea is to connect up all industries to be reached by track service.

Q. Are there any switches now under construction from the river front running into the City?

A. Yes sir, we have under construction and nearly constructed on the river front, from Julia Street to a point near Magazine Street, a switch line; we also have a branch of that track down Commerce Street and down Julia Street to Poydras Street that is nearly completed.

166 Q. What would be the effect upon the efficiency and integrity of the Public Belt system of the City of New Orleans if the trains of the defendant Company, the Louisiana Railway & Navigation Company were allowed to run over them from the upper Parish line with their own equipment up and down the public Belt tracks to Henderson Street?

A. I believe it would entirely destroy our Public Belt system.

Q. Mr. Porch, is the Public Belt Railroad system of the City of New Orleans presently serving the Louisiana Railway & Navigation Company?

A. It is, to its satisfaction.

By Mr. MILLING: The same objections are interposed to this testimony, and these objections are intended to cover not only the evidence of Mr. Porch and other witnesses who have testified but the evidence of any other witness called on the same line.

By the WITNESS: I didn't finish my answer. We are now serving the Louisiana Railway & Navigation Company, and since I have been away fifteen days I think we have put in an additional siding with an arrangement had with the Louisiana Railway & Navigation Company, who obtained the right for our engines to go into the Parish of Jefferson to do business and in the meantime we permit them to shove their cars down on one of their main lines so as to reach our tracks at the Parish of Jefferson, and our engines will take them there.

167 Q. Is the Public Belt system serving all of the railroads

A. Yes; we are doing business with every railroad that enters the City of New Orleans, with interchange facilities and with the limited space we have.

Q. Is the space available for railroad tracks between the upper Parish line and Henderson Street all needed for the Public Belt system?

A. Yes sir, not only needed, but it will be insufficient before long. I recently went to Galveston and looked up the Galveston Wharf Company's facilities. I called upon their General Manager and he gave me exhaustive data covering their conditions, and it differs from ours in this, that they have four times as many sidings as we have, and there is no railroad that can run to its maximum and give business to the main line like this without employing siding facilities. It is therefore knowing that we need all this space that we have gone before the Levee Board and asked permission to lay tracks on this elevation.

Q. Mr. Porch, particularly speaking of the territory between Henderson Street and the Parish line, is all open space there needed for Belt Railroad, its sidings, etc.?

A. Yes sir.

Q. What is the character of the Public Belt Railroad system? Is it merely a switching system?

A. Yes sir; it is a switching system on the maximum basis of two dollars a car, and the return of the empties free. In other words one is hauled for nothing and the other is charged two dollars.

Q. Is there any great surplus between the earnings of the Public Belt and its revenues?

168 A. No sir, I don't think; we are just maintaining ourselves, and the object is not proper.

Q. After charging two dollars a car Mr. Porch is there any margin of profit?

A. No sir.

Q. If there should be a surplus, would that be turned into the public treasury? What would be done with it?

A. It would be used for an increase of facilities and the better taking care of the shipping in this port.

Q. What is the general purposes of the Public Belt system as far as the commerce of the City of New Orleans is concerned?

A. It has been and it is to give everybody an equal privilege on the river front, and specially to the taxpayers who want to do business through these facilities. We have succeeded in eight or nine months in having all railroads do business with us.

Q. Then I understand you to say that this two dollar charge is absorbed by the Public Belt system?

A. Yes sir, the railroad companies pay us monthly, and in very few instances the consignees pay the switching charges.

Q. What do you mean by the railroads absorbing the Belt Railroad charges?

A. It becomes a part of the rate since the word F. O. B. is used. In a great City like this before we had the Belt system they did not mind breaking a car at a point where it would be acceptable. If it was moved to a point where it was acceptable a shoving charge was invoked which was at the cost of the consignee. With the Public

Belt system there is no question of that kind, regardless of the trunk line tendering the business, and the cars are promptly broken without any further instructions.

Q. It makes a belting charge for that?

A. Yes sir, and has removed the obstruction as we as merchants have complained of from time to time long ago; it has removed that for all time to come.

Cross-examination by Mr. RANDOLPH:

Q. What percentage of the cars above Toledano Street are furnished to you by the Louisiana Railway & Navigation Company; what percentage of your movement above Toledano Street?

A. The lines coming into New Orleans above Toledano Street I suppose about fifty per cent; I could give you the exact figures, but I did not know that this would be asked me.

Q. As a matter of fact is it not nearly ninety per cent of your business?

A. There is only one other road that you have made possible under the line that you have drawn and that is the Illinois Central——

Q. I asked you what percentage of the cars that you have been moving over the Public Belt system on that Section at the beginning of the Public Belt at the protection levee to Toledano Street was furnished by the Louisiana Railway & Navigation Company?

A. Well, I don't know what the percentage is accurately.

Q. But as a matter of fact, does not the L. R. & N., practically furnish all of the cars that you move on that section of the Public Belt?

A. Outside of the Illinois Central, yes, because they are the only two connections we have at that point.

170 Q. How many did you haul for the Illinois Central over that section?

A. We have a general superintendent who can give you that information.

Q. But you keep informed more or less as to the movement?

A. Yes sir.

Q. How many cars do you haul for the Illinois Central over that section of the Belt road per day?

A. I think fifty per cent, but since the two roads are involved only perhaps seventy five per cent of the Louisiana Railway & Navigation Company and twenty five per cent of the Illinois Central, counting those two roads.

Q. You are not a practical operator in trains? Have you ever had any experience in it?

A. No sir.

Q. You have been in commercial business most of your life?

A. Yes sir.

Q. What business are you in Mr. Porch?

A. Iron and steel.

Q. You have never been directly connected with the operation of railroads except with this belt system?

A. Exactly.

Q. I understood you to say that if the Louisiana Railway & Navigation Company trains with its locomotives and its cars and its equipment were allowed to go upon this Public Belt road system that it would paralyze the efficiency of the Belt system?

A. Yes, I did.

Q. Suppose the trains and the locomotives and the equipment of the Louisiana Railway & Navigation Company moving on
171 this section of the Belt line were under the authority and control of the Public Belt line, the Commission, how would it affect any other business that was legitimately on those tracks?

A. Well, under the car demurrage rule we have an entire day to place the cars that are tendered us to the point of unloading. We therefore, can arrange the handling of our switch engines to suit our purposes and we are constantly using one of the main line tracks in making interchanges, and frequently we have to place those cars on the main line. We have to do it on account of the insufficiency of sidings.

Q. How far does your double main line extend now?

A. Our double main line extends the whole distance of the tracks on the river front except—

Q. It extends to Toledano Street and to Henderson Street?

A. Yes sir.

Q. And below that also?

A. Yes sir.

Q. From its beginning at the Protection Levee?

A. Yes sir.

By the COURT:

Q. How many hours in twenty-four does it take you to do your switching?

A. We are switching all the time.

Q. Night and day?

A. Yes sir, night and day.

By Mr. RANDOLPH:

Q. You assume now to take a train load of cars, your cars from the L. R. & N., to switch them over this Belt track to whatever point the L. R. & N. wants them taken?

A. Yes sir.

172 Q. You do that with your own switch engines and your own cars?

A. Yes sir.

Q. Suppose instead of the engine title being in you it was in the L. R. & N., and subject to your orders as your own, and instead of the crew being actually paid by you still under your orders and control, what practical difficulty or difference would it make to the Public Belt whether that condition existed?

A. I think it would make every difference because we would have to take the cars of the L. R. & N. when tendered us.

Q. Necessarily so—

A. Regardless of other arrangements that we have for the regular handling of the entire business.

Q. Suppose all of the movements over that Public Belt line were of cars of the Louisiana Railway & Navigation Company or any other road, and were under your rules and regulations how could you be embarrassed by your own rules and regulations?

A. The crew may be under our trainmaster or Superintendent and the cars would have to be moved to the place of unloading with reasonable dispatch, and with the congested condition of the Belt, as it is now, after nine months of operation, they cannot do it now with dispatch.

Q. Don't you attempt to do it now?

A. Yes, under the car demurrage rule.

Q. I am speaking of a case where they are under your orders the same as your own men; why would there be any difficulty in the practical operation? They are simply paid by the L. R. & N. people but they are under your control and direction—what
173 is the difference?

A. Can I explain fully the difference?

Q. Why yes, that is what I want.

A. In the first place we look upon this as a public effort controlled by the public through a commission, and all railroads are to be treated in the handling of their cars alike. It does not matter whether they have old or new privileges—we are able to take care of the cars and give them every facility on this river front without discrimination. Therefore, in handling the Louisiana Railway & Navigation Company's business, we not only have arranged to handle that business that is tendered by the L. R. & N. but also other business; we handle their business down to the point where he proposes to build his lumber wharf, on property that he owns, but we carry his cars to every other railroad and to every industrial

track that we have, and we carry his cars back to every wharf for a sum that does not exceed ten cents a ton.

Now, if in the handling of those cars down to his wharf he would yet have to pay the switching charge.

Q. But your position is that you can do the business he wants done better and cheaper than he can do it himself?

A. That is the position exactly.

Q. And your theory about it is that you can operate his interests or business there better than he can do it himself; is that right?

A. Considering the conditions that surround it I say Yes.

Q. To what extent do you do that for the Illinois Central? Has not the Illinois Central its own tracks and the Stuyvesant
174 Docks?

A. Yes sir.

Q. Has the Illinois Central made any overtures to the Belt Railroad Commission to relieve them from attending to their own business in their own way and turning it over to you?

A. No sir.

Q. Do you know where the Marine Hospital is?

A. I do.

Q. Do you know the location of the Willow Grove landing?

A. I do.

Q. You know that that has been acquired by the Louisiana Railway & Navigation Company for some of its terminals?

A. So I understand.

By Mr. GILMORE: I understood that the title was in some private individual?

By Mr. RANDOLPH: Oh, we own the stock and that's the same thing. We'll prove that when we place our witnesses upon the stand.

By Mr. RANDOLPH:

Q. This difficulty that you speak of you think economically is in favor of the L. R. & N. instead of the arrangements that they proposed?

A. I don't know what arrangement they proposed.

Q. Well, they propose to submit their trains to you and furnish their equipment and have you take them where they designate under the terms of the ordinance.

A. But it don't take them where they go?

Q. Here is the proposition under the ordinance which they have; they claim to have the right, after paying for the construction of the Belt Railroad up to a certain point to operate over that
175 section of the Belt as far as Toledano Street, without paying any switching charges of two dollars a car or anything else. You understand, that is their contention?

A. Yes, I understand it.

Q. Now, under the present arrangement they have to pay at least two dollars a car switching charges don't they?

A. Yes, two dollars for loaded and empties are free.

Q. Do you contend that that two dollars is not a tax on commerce?

A. I certainly do, and I think it is ridiculously low and more so than in any other City.

Q. Do you contend that that two dollars a car is not a tax on commerce?

A. I do certainly assert that it is not a tax on commerce.

Q. Your contention is that if the movement over that switch could be made by this common carrier free of the two dollar charge that it would not be in as favorable condition as it is now, having to pay the two dollars per car?

A. I don't question it.

Q. Let me get at it in a different way. The present cost of getting a car over your road is two dollars per car?

A. Yes, loaded, but empties free.

Q. Under the system that we propose, if our ordinance is maintained that two dollars per car cannot be charged by the Belt Railroad. Do you mean that it is not an advantage to the common carrier not to pay two dollars a car?

176 A. That is not relevant.

Q. That is not for you to say; is it not a fact that it is an advantage to him and to the freight which the tracks bring to the City to be relieved of this charge of two dollars per car for switching instead of permitting him to switch it over in his own trains?

A. I don't think so.

Q. You spoke a while ago of these terminal charges being absorbed in the freight rate?

A. Yes sir.

Q. Who bears the burden of this absorption?

A. The railroad company, but they bear none of the burdens of maintaining the track and putting those cars in condition.

Q. You say that the railroad company absorbs the terminal charge of two dollars per car?

A. Yes sir.

Q. And that that does not bear at all upon the freight moved?

A. Not in proportion to the facilities given.

Q. Do you mean to say that the two dollars per car even though as you express it is absorbed, disappears as a burden from the commerce of the City of New Orleans?

A. Yes, certainly; no railroad has any tracks to build or maintain; the right of way is furnished without cost by the City.

Q. That is your theory that really the service is worth that price?

A. Yes sir, my theory.

Q. And you do not believe that a railroad operating its own trains and coming in here with its own crew without any
177 extra cost of two dollars a car will have any advantage thereby?

A. None whatever.

Q. Are not the charges also attached to the terminal facilities at these wharves that you reach with your Belt road?

A. Yes sir, they have a tax, but that belongs to the Port Commission.

Q. You contend that the position is just as favorable for a railroad to operate over your Belt line at a cost of two dollars a car, and then to pay the cost of shoving those cars, and taking care of the products on the public wharves is as advantageous as the situation of the Illinois Central with the Stuyvesant Docks?

A. More so.

Q. The Illinois Central are still holding on to the Stuyvesant Docks; the Illinois Central consider it a valuable asset in their capitalization, don't they?

A. Yes, but I would like to explain that this investment was made before we built the Public Belt, but I believe that if they showed you a car sheet it would prove that it cost them more than two dollars a car to maintain the Stuyvesant docks.

Q. How many other railroads have their own individual facilities on the front in the Port of New Orleans?

A. Some have partial facilities.

Q. Has the L. R. & N. any private facilities in the Port of New Orleans at the present time?

A. No sir, that is, in the way of wharves.

Q. Well, tracks,—have they any private tracks on the wharf front?

178 A. No sir, not on the wharf front.

Q. Have not all of the other railroads facilities of this kind?

A. Yes, but they have been there many years ago and they are all incomplete and all are using the Public Belt.

By Mr. MILLING:

Q. You say that these tracks and these rights were there when the Public Belt was built?

A. Yes sir, our tracks go through theirs.

Q. And this contract existed before the Belt road was built?

A. These ordinances were passed prior to ours.

Q. I ask you now if our ordinance and contract had not existed and did not exist before the Belt road was built?

A. Yes sir; your ordinance was passed before.

Q. You spoke of the confusion or congestion on the Belt of traffic. Is it not a fact that the L. R. & N. gives you more cars than any other railroad that have an interchange with you?

A. I haven't looked over the car record for sixteen days; I have been away; but I think that statement is correct, prior to that time.

Q. If this is the fact, Mr. Porch, that it takes a certain number of engines or a certain amount of time of one engine to move that traffic, that is a fact, is it not?

A. Yes, naturally.

Q. Then, can you explain why there would be any difficulty to run any more engines on those tracks now, whether you
179 ran the engines of the defendant Company or whether you ran your own engines?

A. The operation of the Belt Railroad was through the means of a commission; it owns its own engine, and I have been under the firm belief that if we went into partnership with any other railroad it would be an emasculation of the ideas of a Belt, and during the nine months of operation we had found this out ourselves. Now, we have to handle cars every day in the week, for twenty four hours, to suit the vast interests of the various railroads connected with the Belt Railroad.

Q. Well, now Mr. Porch, is it not a fact that the objection to letting any other railroad get on the Belt tracks or have any right on the Belt tracks or acquire any rights to put their trains and equipment there is a matter of sentiment, pure and simple, as much as anything else with this Commission?

A. A matter of sentiment did not enter into it; it is a matter of the integrity of the Belt Railroad Commission, and we always sought and pursued legal advice on that.

Q. What do you mean by integrity of the Belt?

A. As to the public ownership.

Q. In other words your idea is that if you allow any railroad to have any rights whatever on the Belt road that it is no longer a public belt road; that is the idea?

A. Yes sir.

Q. Is not that sentiment, as long as it don't interfere with the full operation of the Belt Railroad as intended originally?

A. No sir, I don't think it is sentiment.

180 Q. Well, you will admit this, however, that there is no difference in the operation of the trains over your road whether the engine is yours or the engine of a railroad, provided it is under your management and control?

A. Providing we could move that engine in any of the twenty four hours that we saw fit to move it, and if we don't move it we will not have to pay a charge.

Q. Down to the Willow Grove landing of this Company there is no other interchange of these tracks? In other words all of the cars that you receive from the upper line of the Willow Grove is received from the L. R. & N.?

A. Yes sir, at the present time, but there is no telling what is to come hereafter.

Q. Should it in delivering its through freight be permitted to place its own equipment on these tracks it would not interfere with the moving of trains or cars of any other road would it?

A. I think it would.

Q. You have already stated that you received no cars above that point; then how could it interfere?

A. The Belt road is not built for to-day but for the future and other trunk lines will be coming in.

Q. I want to know this: If there is no other interchange tracks between Willow Grove landing and the upper line, how is it possible at this time for the carrying out of this L. R. & N. ordinance to interfere at all with the operation of your Belt line?

A. We can handle it as I said before if you give us our time to handle it in.

Q. I ask you how it is possible to interfere with the handling of other cars on the track at the present time?

A. At the present time we can handle the business of the L. R. & N. and ten times as much if we had the facilities and sidings to put in. As the matter now stands we cannot handle them unless we do it in our own way, and the Belt railroad was never built, in the minds of the Commission, for service to or to accommodate—

Q. The question is: I want to know this. If there is no other interchange tracks between Willow Grove landing and the upper line, how is it possible at this time for the carrying out of the L. R. & N. ordinance to interfere at all with the operation of your Belt line?

A. We can handle the cars.

Q. Can you handle them without interfering with the traffic of other roads or other cars?

A. No sir, not under that method.

Q. Then what other cars have you got to handle between Willow Grove and the upper Parish line?

A. None at present.

Q. How is it possible then for this operation to interfere with other roads?

A. We cannot handle them on the Belt road, that is, our trains, because we have no storage facilities.

Q. The Belt road is not completed?

A. It is practically completed on the river front.

Q. Don't you know that Mr. Edenborn, if he got a landing over this track, that he would have innumerable tracks there necessarily?

A. I don't know, I have never seen his plans.

Q. Wouldn't that be a natural thing to do if he had a landing of that kind?

182 A. I think so, if he has space enough.

By the COURT:

Q. Mr. Porch, if the Louisiana Railway & Navigation Co., under your direction and under your rules, that is to say both as to the time when, and the method in which it shall use your tracks merely as a trunk line from the parish line of Jefferson to its property at Willow Grove and then get off of your track, and attend to its own business on its own property, would that plan be feasible?

A. I don't know.

Q. Give your idea?

A. Will you repeat the question?

Q. Mr. Porch if the Louisiana Railway & Navigation Co., under your direction and under your rule, that is to say, both as to the time when, and the method in which it shall use your tracks merely as a trunk line from the Parish line of Jefferson to its property at Willow Grove and then get off of your track and attend to its own business on its own property would that plan be feasible, you understand?

A. I do.

Q. Not to switch from place to place but to use it as a trunk line to get to its property on the river front?

A. Its property on the river front is cut off from the river front by our main line tracks that go down Leake Avenue. In order to use those squares of ground that they have acquired near the hospital, and at the same time use the wharf that they propose to construct, their switching would be consequently across our tracks.

183 Q. That is not the question, because, non constat he would have the right to do that very thing once your Belt would have put their cars on their property, I am speaking now of the use of that trunk line for the purpose of putting their cars on that property?

A. It has never been made clear to the Commission. If they should do this, that is, their local switching to and from their yards, it has to be done by the Public Belt or if they propose to put switches in their yards to take care of their switching at any event the location as it is there means congestion and means complications on the part of the Belt Commission with the Port Commission. The Port Commission has certain jurisdiction there and we never have laid a foot of track without getting their permission, and under the proviso of that grant it has a distinctly stated clause that if a foreign engine moves over the Belt road it will cause an annulment of that agreement and we have been following that from the first foot of track that we laid at the Harrison line. We have gone to them and got this permission, and if such a thing occurs the work of four years will be entirely destroyed.

By Mr. RANDOLPH: Mr. Stenographer please read the question propounded by the Judge to Mr. Porch.

By the COURT: Mr. Porch has answered it unless you want to repeat the question to him.

By Mr. MILLING:

Q. Well Mr. Porch, does not the track of the Public Belt Railroad cross the tracks of other railroads in the City of New Orleans?

184 A. Yes sir.

Q. How many times does your Belt cross the Illinois Central?

A. I don't remember but we cross the tracks of other railroads I suppose fifty times.

Q. You still operate the Public Belt notwithstanding that fact, don't you?

A. Yes sir.

Q. Would it be more difficult or impede the movement of your trains to any great extent by the switch tracks of the L. R. & N. at its terminals crossing the Public Belt track?

A. Of course, it would be one more terminal on account of the congested condition, and one more by the straw that broke the camel's back if you permitted—

Q. Outside of the Port Commission?

A. I am speaking of the right of way over the Belt Railroad.

Q. I think we can still go through that yard and still operate notwithstanding that we might lay tracks on the river front and on both sides of your Belt Railroad track and cross them occasionally with our track; in other words the L. R. & N. would have one crossing to about fifty of the Illinois Central would it not?

A. Not fifty of the Illinois Central.

Q. Well, say thirty? Don't you cross the Illinois Central tracks about thirty times?

A. No sir, I don't think so.

Q. How many then?

A. We may cross the Illinois Central ten or fifteen times; 185 we arranged our tracks to avoid crossing as little as possible.

Q. Is it not a fact that your railroad is under the control of the Interstate Commerce Commission?

A. At the present time we have filed our tariffs and are doing business under those tariffs.

Q. It is a fact then that you have to have an inspector and if anything is the matter with a car you have to send it back for repairs?

A. We are complying with the conditions of the Master Car Builders' rules.

Q. And a car that might get to the upper Parish line being handled by a railroad company, say, the L. R. & N., and that car had something wrong with it, they would prevent it being accepted and it would be returned by you?

A. Yes sir.

Q. Is it not a fact that in any number of instances the same car could be carried three or four miles further down if they had the right to carry it isn't that a fact?

A. Yes, if they brought it to the gateway they could take it three or four miles more.

By Mr. GILMORE:

Q. Is it possible Mr. Porch to operate your Belt Railroad unless the Public Belt Railroad Commission of the City of New Orleans have absolute, unlimited and exclusive control of the Public Belt Railroad system?

A. We could not.

Q. Is it possible for the Public Belt Railroad system to be operated with the limitation upon its jurisdiction such as I now read, paragraph (f) of Section 3 of Ord. No. 1997. New 186 Council Series granting rights of ways to the Louisiana Railway & Navigation Company, reading as follows:

"That all controversies between the Louisiana Railway & Navigation Company on the one side, and the Public Belt authority, or any other company or companies to which the City or her Public Belt authority may grant the use of said track and appurtenances on the one side, relative to the use of said tracks and appurtenances or the cost of construction and maintenance thereof, or the rules

and regulations relative to the movement and handling of cars, trains and traffic thereon and thereover, shall be submitted to the arbitration of three disinterested parties; one to be selected by the Louisiana Railway & Navigation Company, the second by the Public Belt authority or such other company or companies as the case may be; and the other two by the two just chosen; and the decision of this tribunal or any two of them shall have the effect of an amicable composition."

By Mr. MILLING: We object to counsel calling upon Mr. Porch to construe this ordinance. That is a matter for the Court to do in the event that the Court holds that any of this evidence affects the question at all.

187 By the COURT: The objection is maintained.

By Mr. GILMORE: I reserve a bill of exceptions.

By Mr. GILMORE:

Q. Is it possible to operate the Belt railroad system unless the City of New Orleans has absolute control unlimited and exclusive management of the Belt system?

A. No sir, I don't think so.

Q. If the Louisiana Railway & Navigation Company ran down from the upper parish line to Octavia Street on its own tracks it would have to pay for that?

A. Yes sir, pay for them and maintain them.

Q. If they built a wharf at Octavia Street for lumber purposes it would cost them something would it not?

A. It certainly would.

Q. Would not the cost of that wharf and the cost of its maintenance and the cost of the track and maintenance constitute some expense to this railroad Company?

A. Yes, I think it would be greater than the switching service.

Q. Would they not have to pay something if their locomotives ran from the upper line to Octavia Street for the crew and engines?

By Mr. MILLING: Objected to for the reason first that it is an argument and that Mr. Porch has already testified that they conduct the business a great deal better than the defendant, and furthermore that this character of evidence cannot in any manner enlighten the Court or in any manner solve the issue presented to the Court as to whether or not it would be cheaper to use the Belt or build a railroad ourselves. This is a question that cannot enter into the

188 controversy.

By the COURT: The objection is maintained.

By Mr. GILMORE: I reserve a bill of exceptions.

By Mr. GILMORE:

Q. Are not all of these charges resulting from this investment absorbed in the freight rates by these railroads?

A. Yes, except from local switching in the City limits.

Q. Does the Louisiana Railway & Navigation Company observe the Belt charge under the working agreement?

A. Yes, they do.

Q. Is it not contemplated to build a Belt Railroad around the entire City?

A. The plan is to encircle the City.

Q. Along what part of the upper Parish line is the construction to be handled?

A. At the protection levee to the rear.

Q. Would the obstruction of the L. R. & N. from the parish line to Octavia Street interfere with the connections in the rear that are contemplated?

A. Yes, we need all of the trackage we have to handle cars in the manner we have to handle them and absolutely under our own control.

Q. When you were in Galveston making an investigation did you learn anything of an attempt by some single railroad to run on the Belt tracks of the Galveston Wharf Company?

By Mr. MILLING: We object, your Honor.

By the COURT: The objection is well taken.

By Mr. GILMORE: We reserve a bill of exceptions.

189 By Mr. GILMORE:

Q. Mr. Poreh did the New Orleans & San Francisco Railroad Company ever build any tracks on the river front?

A. No sir, not a foot.

Q. Has the Frisco Company ever made any demand to operate over the Public Belt tracks?

A. No sir, never.

By Mr. MILLING: Has the Frisco Company built any railroad in the City of New Orleans or Parish of Orleans?

A. I believe not.

Q. Then, it would hardly be possible for them to operate any trains over the Belt road?

By Mr. GILMORE:

Q. What company succeeded to the New Orleans & San Francisco Railroad?

A. What is known now as the L. R. & N.

Q. What Company is the successor of the New Orleans & San Francisco Railroad Company?

A. The New Orleans Terminal Company.

By Mr. MILLING:

Q. The New Orleans Terminal Company have established their terminals at Chalmette?

A. Yes sir.

Q. Let me ask you this question: Mr. Gilmore asked you the circumstance just before the close of your redirect examination originally as to whether or not the operation of this train of the L. R. & N. would interfere with the operation of the Public Belt in the event that they completed the Belt road?

190 A. Yes, in circling the City.

Q. Would there be any greater interference than there would be in crossing the tracks of the I. C., L. & N. or North Eastern?

A. I have attempted to answer that several times, and I cannot change my view about it if I tried. It is along the lines to operate the Belt road successfully and to build it up, and we intend to manage our own property.

Q. The bringing in of trains in the read of the City would interfere with the operation of the Belt in contemplation, but I want to know if there would be any greater interference than the bringing in of the trains of the Illinois Central or the North Eastern or any other road that you would cross in building your Belt road?

A. The congested condition on the river front is causing all railroads to get yardage elsewhere and ultimately we expect to do all that work if the improvements in contemplation are carried through just as the Galveston Wharf Company are now doing.

By Mr. GILMORE: Counsel for the City of New Orleans offers in evidence a map showing the entire completed and contemplated Belt railroad system of the City of New Orleans, together with a pamphlet entitled "Key to the Commercial Situation" marked A 21.

By Mr. MILLING: We object to the pamphlet but not to the map.

By the COURT: File the pamphlet with your argument.

By Mr. GILMORE: I will annex the pamphlet to a bill of exceptions.

191 J. L. LOVE, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. GILMORE:

Q. Mr. Love, what connection have you with the Public Belt Commission of the City of New Orleans?

A. I have been on the Commission since its organization.

Q. You know all about the present Belt Railroad system?

A. Yes, I think so.

Q. Do you know how much is constructed?

A. Yes sir.

Q. How much of it is constructed?

A. About ten miles and a half.

Q. I mean all along the river front?

A. Yes sir.

Q. Is there a double or single track from Henderson St. to Audubon Park?

A. Double track.

Q. Mr. Love, as a member of the Public Belt Railroad Commission I would like you to state whether or not it is a physical possibility to operate the Public Belt Railroad as devised and outlined by the City of New Orleans if the Louisiana Railway & Navigation Company, or any number of railroads, or any particular railroad is allowed to operate over the Public Belt tracks with their own cars?

A. No sir, I don't think it is at all feasible.

192 Cross-examination by Mr. RANDOLPH:

Q. What is your business?

A. Molasses.

Q. Have you ever been in the railroad business?

A. Yes sir.

Q. In what capacity?

A. I have served all the way from Clerk to Auditor.

Q. Not in what is called the operating department?

A. No sir.

Q. At the present time you are handling the cars of the Louisiana Railway & Navigation Company?

A. Yes sir.

Q. And charging them two dollars per car?

A. Yes sir.

Q. Why could you not carry them under our ordinance, you having control of them while on the Belt Road? What would be the difference except the two dollars per car?

A. My opinion is that two dollars don't cover the cost.

Q. That is too cheap?

A. Yes sir.

Q. You don't know what time you are going to raise that? You have the power to raise it?

A. It is in the ordinance.

Q. I understood you to say, as far as you tested the matter, the Belt Railroad system is hard up for money?

A. Why, I didn't say that.

Q. It is not self sustaining?

A. Yes, it has been self sustaining up to this time.

Q. The question I asked you a moment ago—you are at present hauling over this Belt road the cars of the Louisiana Railway & Navigation Company?

193 A. Yes sir.

Q. And you charge them two dollars a piece?

A. Yes sir.

Q. Is there any physical difference in your doing it without putting the charge of two dollars on it?

A. No; we could not do it without the charge.

Q. The reason you want it is to have a few dollars?

A. We want to have the control of it.

Q. Under our ordinance we claim that we have a right to have our cars drawn over a certain section of that Belt line as far down as Henderson Street without paying any switching charge for cars at the rate of two dollars. You understand, that is our claim.

A. Yes sir.

Q. Now, if we were to turn over our cars as now except with our own locomotives and our own crew that you dictate to just as you please, and just when they shall come and go and where and how, why could you not do that business being under your control just as now?

A. My experience is you cannot do two businesses and have two employers instead of one man.

Q. But if we deliver our cars and locomotives and men and put them under your orders?

A. They are your men and we cannot discharge them if we see fit.

Q. But if we put them there and guarantee you that you can discharge them and tell them to do your bidding, why could you not do the work of switching those cars under those circumstances just as you do it now?

194 A. Just simply because your men would want to operate for your own benefit and not ours.

Q. Suppose they obeyed your orders?

A. That work would conflict with our work.

Q. Now, if they were as a matter of fact under the orders and under our instructions turned over to you why could you not arrange the movement of those cars just as you are doing now, it being within your discretion when they should move them and how they should move them?

A. Your equipment is designated to go a certain place over the Belt road. We take the stuff, and if we want to carry it below and bring it back we can do so.

Q. You have to put the stuff where we tell you?

A. Yes.

Q. Under the arrangement mentioned we turn the stuff over to you. Why could you not turn it over the same way if it is supposed to go where we tell you ultimately? Why could it not go on as free from confusion as it does now?

A. It brings in a conflict between your employes and ours.

Q. Even though our employes were absolutely under your orders it would bring in a conflict?

A. If you are paying them they would not be absolutely under our orders.

Q. And for that reason the conflict would begin and there would be danger of the Belt system?

A. I think there is more in it than that.

Q. But there is that much in it anyhow isn't there?

A. There is that much in it yes and more too.

195 HAMPTON REYNOLDS, recalled.

By Mr. GILMORE: You gentlemen want the figures on the cost of the tracks.

By Mr. RANDOLPH:

Q. Mr. Reynolds from upper Audubon Park to Toledano Street what is the cost of construction; it is a double track, as I understand, isn't it?

A. Yes, sir.

Q. What is the cost from the upper Audubon Park line to Toledano Street?

A. Approximately \$61,300.00.

Q. Then from Toledano Street down to Henderson Street?

A. Approximately \$32,000.00.

By Mr. GILMORE: Have you any more figures that have been called for?

A. Yes sir, the switch tracks in that same territory.

Q. Is this a statement made up by you?

A. Yes sir, by Mr. Joubert the Secretary and myself.

Q. Takes from the records?

A. Yes sir.

By Mr. GILMORE: On behalf of the City of New Orleans I offer in evidence a statement of the cost of main and switch tracks between Henderson Street and the upper Parish line, as taken from the record of the Belt Commission, marked A 22.

By Mr. GILMORE:

Q. Mr. Reynolds that does not include the switching—the figures you gave the defendant's counsel?

A. No sir.

196 Q. How much money has been expended by the Public Belt Railroad Commission for the switches in that territory?

A. \$19,541.28.

Cross-examination by Mr. RANDOLPH:

Q. The memoranda offered by you in connection with your testimony and which is marked A 22 shows the cost of the switches to be \$19,541.28?

A. Yes sir.

Q. Then below that is a memorandum called "Main line, labor and material" aggregating \$107,300.00—and below that is the sum total—What is that \$107,300.00?

A. I would like to explain that statement.

Q. Yes, that is why I am asking you the question. Then the statement is correct that the cost of the switches as put down there was \$19,541.28?

A. Yes sir.

Q. And the main lines from upper Audubon Park to Toledano Street is \$61,300.00?

A. Yes sir.

Q. And from Toledano Street to Henderson Street is?

A. \$32,000.00.

Q. And these totals on the statement are simply methods of arriving at that calculation?

A. Yes sir.

Q. That is the cost as you have stated?

A. Yes, that is as near as we could arrive at.

Q. Those switches are within that territory?

A. Yes sir, between Toledano and Henderson Street.

By Mr. MILLING:

Q. Then there are no switches above Toledano Street are there?

197 A. I am *now* connected with the Belt Railroad now. There were some switches, one was built near Henry Clay Avenue and I think a part of that is in still.

By Mr. RANDOLPH: So far as you know that represents the cost of the switches in the territory that you have been asked about?

A. Yes sir.

FRANK J. JOUBERT, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. GILMORE:

Q. What is your position with the Public Belt Railroad?

A. Secretary-Treasurer.

Q. Can you state or have you any certificate from your records showing the number of cars handled by the Public Belt Railroad for the defendant Company, the Louisiana Railway & Navigation Company?

A. Yes sir, from the 18th of August the date of the formal operation of the Public Belt to February 28th, to the 1st of the present month the Belt handled cars coming from the Louisiana Railway & Navigation Company to various points along its lines, 1,973 representing a revenue of \$3,946.00.

Q. Does your statement show the cars operated for other roads?

A. Yes sir, the Texas & Pacific, 3,300 cars, revenue of \$6,600.00; the Northeastern, from the Press Street station 2,073 cars, revenue of \$4,146.00—the Louisiana Railway & Navigation Company 1,973 cars, revenue \$3,946.—I am reading this in the order of the amount of business given by each line; the Louisiana Railway & Navigation Company is the third and the fourth is the Illinois Central Railroad Company, 1,317 cars, revenue 2,634 dollars. The Morgan's Louisiana & Texas, 1,093 cars, representing a revenue of \$2,186.00—The Louisville & Nashville R. R. 1,017 cars, representing a revenue of \$2,034.00—The New Orleans Great Northern 488 cars, revenue \$976.00—New Orleans Terminal Company, 46 cars, \$92.00—The New Orleans & North Eastern, from the Basin Street station, 26 cars, revenue \$52.00—Now, the total inter line switching, that is, cars received from all connections represent 11,333 cars and a revenue of \$22,666.00; the percentage of business given by each line is as follows:—This is the percentage of all of the business:

Texas & Pacific Railroad, 29 1/10ths.

New Orleans & North Eastern, 18 3/10ths.

Louisiana Railway & Navigation Company 17 5/10ths.

Illinois Central Railroad, 11 6-10ths.

Morgan's Louisiana & Texas, 9 6-10ths.

Louisville & Nashville, 9.

New Orleans, Great Northern, 4 3-10ths.

New Orleans Terminal Company, 4-10ths of 1%.

New Orleans & North Eastern, from Basin Street station, 2-10ths of 1%.

In addition to the interline switching representing 11,333 cars,

there was local switching cars moved for account of Reynolds & Company on Levee contract in the building of public levees along the river front, carrying filling for levees from the Audubon Park batture to Lousi Street, 9,033 cars.

Adam Ruppel, levee contractor, 36 cars.

Miscellaneous firms, for deliveries from point to point on the Belt Railroad, that is, after the cars have been received from connections to be placed, in other words, the second placement of that particular car is 123 cars and this represents a revenue total of \$18,392.00 which was for the handling of 9,196 cars.

Local switching and in addition to that, the revenue from car service was approximately \$2,166.00.

The question was asked this morning as to what proportion of business was done by the Public Belt in the section that appears to be under discussion, from the upper line of Audubon Park—

By Mr. GILMORE: Counsel for the City of New Orleans offers in evidence the statement the witness just read from, marked A 23.

By Mr. GILMORE:

Q. Has there been recently constructed an interchange or switch between Toledano Street or between Henderson Street and the upper Parish line for use of the Illinois Central?

A. Yes sir.

Q. Where is that switch located?

A. At Cherokee Street.

Q. Where is Cherokee Street?

A. Just above Audubon Park.

Q. Is there any business being presently done over that interchange?

A. Yes sir, daily.

200 Q. So, the Public Belt Railroad was not only doing business with the Louisiana Railway & Navigation Company between the upper Parish line and Henderson Street, but it is also doing business with the Illinois Central over a special interchange at Cherokee Street.

A. Yes sir.

Q. Do you know the volume of business done there?

A. It is stated in this statement.

Q. Mr. Porch has stated that there is only one railroad doing business up there with the Belt?

A. It is contemplated to construct the wharves up there for the rice business. Bloom & Son have recently paid \$2,000.00 for their switch at Adele Street, and in order to make deliveries to these lines we have to reserve the section now in dispute in order to deliver these cars to the Illinois Central and L. & N., and likewise at Commerce Street by which, probably, twenty industries, will be served, with cars going over the lines.

Q. Are there any other industries located in that territory that are about to make connection with the Belt?

A. Yes, there are; the American Paint Works is one.

Q. Will the business from these industries all have to be handled

over the main track by switch tracks between Henderson Street and the Parish line?

A. Yes, absolutely.

Q. All of this large volume of business that will be drawn from the Commerce Street and the Julia Street switch will all have to be handled over the main line?

A. Yes sir, certainly.

Cross-examination by Mr. MILLING:

201 Q. During the time that the Louisiana Railway & Navigation Company have been delivering cars to you, state whether or not you had a cave in the levee which cut off communication with them for some time?

A. No sir, it didn't with them, but there was a cave in the levee above Henderson Street, at Fourth Street, but it didn't cut off communication with the Louisiana Railway & Navigation Company for all deliveries from the protection levee to Fourth Street and deliveries coming from the L. R. & N. below Fourth Street were made via the Louisville & Nashville; that was temporary.

Q. In the month of January is it not a fact that the L. R. & N. delivered to you more cars than any other road?

A. I believe so. Does that statement say so?

Q. Yes?

A. Then it is correct.

Q. In the month of February the Texas & Pacific \$1,028. as against \$1,104.00?

A. Yes sir.

Q. You say there are other tracks or connections above Henderson Street. Are there other tracks or connections above Willow Grove landing and the upper Parish line?

A. Yes sir.

Q. What track?

A. The Illinois Central.

Q. Where does it connect?

A. At Cherokee Street.

Q. How far above Willow Grove landing?

A. I don't know exactly but I presume a mile or a mile and a half.

202 Q. I notice that the Morgan's Louisiana & Texas R. R., is only 9.610ths per cent that they delivered over this joint track owned by them and the Public Belt?

A. There is no track that is owned jointly; it is under the control of the Port Commission, but the Southern Pacific Steamship line has a track given to the steamship line and is run in connection with their railroad business. The Morgan Louisiana & Texas R. R. & Steamship Company serve their own Steamship wharf. The track is controlled by the Port Commission and the Port Commission has given the Belt Railroad the privilege of traversing this track of the Morgan line.

Q. I asked you whether or not you included in this statement the

cars of the Morgan's Louisiana & Texas Railroad & Steamship line that was run over that track?

A. I don't quite understand the question. In order to answer I'll answer as I understand it. You desire to know whether the business included in that statement includes the business that the Morgan line handled for their own account from that wharf?

Q. On the track that is operated generally by them with the Belt Railroad?

A. The same track that the Belt Railroad carries cars for them on is not included in this statement because we don't collect the switching charges on business that is handled by the Morgan Railroad itself, which is their own business from their New York steamers over its own track.

Q. You don't include in their the cars that they handle
203 across the river either?

A. We have nothing at all to do with Algiers.

Q. Mr. McCloskey swore here that the Belt Railroad and the Morgan Railroad Company operated a switch track jointly to the Morgan line wharf. That is the track that I am speaking to you about? I desire to know whether or not you included any of the cars that passed over these joint tracks in this statement?

A. There is no joint tracks; the Port Commission has control of that track, and they have obtained the right to carry cars from all connections to that point and likewise given the Morgan line the privilege of taking care of their business of their steamers.

Q. And you have not included in this statement the cars passing over that track?

A. Yes, I have; this account for all other lines except the Morgan line.

Q. But not for the Morgan line?

A. No sir; the Morgan line owned the track; they built it, and we have the privilege of running over it.

Q. Well, you have not included I suppose the cars of the Illinois Central that go into the fruit wharf either. They don't pass over your tracks?

A. What fruit wharf?

Q. The fruit wharf of the Illinois Central?

A. At Erato Street?

Q. I don't know what street; you know more about it than I do.

A. I don't know much about that banana business.

204 By the COURT:

Q. Let me understand what the meaning of this joint switch track is. I understand from Mr. McCloskey's testimony that there is a switch track which has an opening on the Morgan track and on your main track?

A. Yes, that is correct.

Q. And what they put on the track does not pass over your line at all?

A. Absolutely no.

Q. And what you put on your line don't go over their tracks?

A. No sir, the Port Commission gave permission to the Morgan line because they operate a steamship and railroad line at that particular wharf, but exclusive service by the Morgan line prevents competition with the other lines, and they gave them the same privilege, and they gave the Belt Road a like privilege to go over that track with equal right that the Morgan line had, except the Morgan line would have a preferential right over that track, the Morgan line having paid for that switch.

By Mr. MILLING:

Q. Suppose that the L. R. & N. had a car of lumber that they wanted to ship over the Southern Pacific Steamship lines it would cost them two dollars a car to get that to the wharf?

A. Yes sir.

Q. The Southern Pacific would take that same lumber and carry it there over its own tracks?

A. No sir, it could not.

Q. Why not?

A. Because it is not connected with the L. R. & N.

205 Q. The Southern Pacific could take a car load of lumber from any car on its road and deliver it without paying two dollars?

A. Yes, if it delivers it to its own steamship lines.

By the COURT:

Q. A car coming from the upper Jefferson line and going down to Kentucky Street would not have to pass over your main line?

A. No sir.

By Mr. MILLING:

Q. How long is that switch that runs into the Morgan line wharf?

A. I don't know, but I can easily ascertain that.

By Mr. GILMORE:

Q. Your certificate shows that you do a lot of local switching?

A. Yes sir.

Q. What is the character of that local switching detailed on your statement?

A. The principal local switching on this statement is the dirt business handled on account of the levee contracts.

Q. On the Julia Street and the Commerce switches what kind of business would they carry?

A. Business of all characters.

Q. What kind of industries are located along Julia and Commerce Street?

A. Quite a number; the Mackie Grocery Company, Woodward & Wight, Henderson Sugar Refinery, H. T. Cotton & Co., Campbell's Glass & Paint Works, Levy's Rice Milling Co., and several
206 others.

Q. And these connections with industries along the river front would be of a similar character?

A. Yes sir.

Q. Then the Public Belt does switching not only for railroads but for individuals?

A. Yes sir.

Q. And all of this switching done for Merchants and individuals has to be operated over the Public Belt from Henderson Street up to the upper Parish line?

A. Yes sir.

Q. This statement of track percentage of business done from August to the last day of February shows——

By Mr. MILLING: I don't think it is necessary to read all this.

By Mr. GILMORE: I offer in evidence this statement of track percentage of business done from August, 1908 to February, 1909, marked A 24.

By Mr. MILLING:

Q. Your statement shows that all of this business has occurred since August, 1908, I believe.

A. Yes sir.

Q. I understood you to say that all of this business of these various private tracks would have to go over the Belt from Henderson Street up to the upper Parish line?

A. Yes, anywhere along the line of the Belt.

Q. Isn't there a great deal of freight that comes from the Southern Pacific and the Northeastern that never gets there?

A. Mr. McCloskey spoke of the lumber wharf contemplated above Louisiana Avenue; when that wharf is constructed we will
207 have to provide for it, and in addition to that the Belt Railroad is not designed for to-day alone but it is going to expand and not remain as it is now.

Q. I want to know how much lumber is included in these various cars.

A. I didn't know that this lumber question was going to take such a prominent part in this case and therefore I didn't prepare any statement regarding lumber; but there had been considerable lumber handled on the public belt.

By Mr. GILMORE: The City rests in chief.

A true and correct report.

(Signed)

A. E. OLIVIERI,
Stenographer.

208

Testimony for Plaintiff in Rebuttal.

THURSDAY, April 1st, 1909.

SAM'L L. GILMORE, Esqr., who being first duly sworn by the Court on behalf of plaintiff in rebuttal, testified as follows:

"I was City Attorney on the 15th day of May, 1896, to the 15th day of March, 1909, and I am familiar with all of the negotiations had between the New Orleans & San Francisco Railroad Company

and the City of New Orleans, and the Louisiana Railway & Navigation Company.

There were, as Governor Sanders has stated, negotiations prior to the institution and subsequent to the institution of this suit, looking to some settlement. The negotiations prior to the institution of the suit were formal and looked to a settlement of the whole controversy. The negotiations since looked to a temporary adjustment pending this suit. There were however no negotiations to my recollection from the date of the filing of the suit until the beginning of the year 1908.

As City Attorney, acting for the Government after the decision in the Port Commission case I advised and took the public position that no railroad, the Frisco or the Louisiana Railway & Navigation Company had any longer any right to operate over the existing Public

209 Belt Railroad tracks or any right to construct any part of the tracks covered by either the Frisco or the Louisiana Railway & Navigation Co., tracks, and I gave a written opinion that the grant was indivisible—

By Mr. MILLING: We object to Mr. Gilmore giving his opinion as to whether or not this grant was indivisible and we object to his giving his opinions or reasons for the whys and wherefores.

By Mr. GILMORE: The City Attorney of the City of New Orleans the legal adviser of the municipality took the public position that the decision of the Supreme Court in the case of the Port Commission against the Frisco road prevented and deprived any railroad of any claim or right to construct any tracks or any part of any railroad, or to operate over any tracks, public or private on the river front. I am simply giving the fact that the government took the position that no railroad could operate, and therefore every railroad had a legal excuse, and if any railroad had attempted to operate they would have been stopped by the municipal authorities.

By the COURT:

Q. Mr. Gilmore, in this connection let me ask you: this Belt Railroad is built on public property of some sort?

A. Yes sir.

Q. On what kind of property is it built, On the street, or is it built on the wharf or what?

A. It is built on the street and the public road practically behind the wharf, all of the way down, in the upper part it is proper to say that it is built on ground acquired by contract between the City of New Orleans and the Illinois Central Railroad Company.
210 under Ordinance No. 1580, New Council Series, by the terms of which that center strip was dedicated for the use of the Public Belt Railroad, to be operated in a public way, and in that connection I will offer in evidence Ordinance No. 1580—

By Mr. GILMORE: Counsel for the Mayor offers in evidence Ordinance No. 1580 New Council Series.

By Mr. MILLING:

Q. That street is called Leake Avenue?

A. Yes sir, a part of it.

Q. There are two Public Belt Railroad tracks and two tracks of the Frisco Railroad on it?

A. There are two Public Belt Railroad tracks and two tracks of the Illinois Central.

Q. And there is room for how many other tracks?

A. None on that street.

Q. How wide is it?

A. It is fifty feet wide.

Q. There is room for another track?

A. No sir, not on the central strip.

Q. How wide is the center strip?

A. Fifty feet; you cannot put more than two tracks there.

Q. That is the neutral ground you mean?

A. Yes, the neutral ground.

Q. There are no tracks on the street itself?

A. No sir, the street is so laid out that there should never be tracks there, but there should be a roadway for vehicles. Prior to the passage of the Illinois Central ordinance there never was any open roadway along the river front as provided for by this ordinance for the general commercial purposes.

211 A. S. PHELPS, who being first duly sworn by the Minute Clerk, testified as follows:

Direct examination by Mr. GILMORE:

Q. Mr. Phelps, what is your position?

A. I am Superintendent of the Public Belt Railroad.

Q. What railroad experience have you had Mr. Phelps.

A. Twenty years.

Q. Have you ever had charge of any railroad?

A. Yes sir.

Q. What has been your railroad experience?

A. I have had some three or four years' experience, practically, and with the operation of the L., N. O. & T. Railroad in Memphis; five years in charge of the government yards at Harahan, and about two years with the L., N. O. & T. in New Orleans, generally known as the Yazoo & Mississippi Valley.

Q. You, of course, are acquainted with the Public Belt Railroad, its purposes and construction?

A. Yes sir.

Q. What is the character of the Public Belt Railroad?

A. As I understand it, it is almost purely a switching proposition.

Q. To connect—

A. To connect all railroads with all of the different public wharves and whatever industries can be reached by our tracks.

Q. It is designed to serve all railroads?

A. Yes sir.

Q. It is designed also to serve private shippers in and out?

A. Yes sir.

Q. Has it connection with the wharves and with the different industries?

212 A. Yes sir, it is connected with all of the public wharves and in fact with all of the wharves except the Stuyvesant docks, and a small wharf of the Illinois Central, a fruit wharf, and a small wharf of the Louisville & Nashville.

By Mr. MILLING: This is not in rebuttal of anything that we have brought out. Unless we have contradicted in some way his evidence, I don't see that it is necessary to offer this rebuttal.

By Mr. GILMORE:

Q. Just state to the Court whether it would be practical to operate that switching system and have the equipment of the Louisiana Railway & Navigation Company operating its trains and cars over the Belt Railroad system?

A. No sir, it is not.

Q. Give your reasons?

A. Well, to all intents and purposes the physical conditions from the protection levee to Toledano Street is a double main line; as a matter of reality it is not; we have no storage facilities and consequently we use one of these main lines practically to protection levee as storage, and to make up cuts on, and all that sort of business—We simply use that for a system of cross-overs; it gives us a single main line which is simply a switch line. From Toledano to St. Mary Street we have one single track to go over from the upper to the lower end of the City; we have to operate that one track all of the time; we have two tracks from St. Louis Street to Henderson Street; one is used as a team track, or rather wharf track to feed a portion of the Leyland line, the South-Atlantic Steamship Company, the American line, and from there we have a single
213 track to Lafayette Street.

Q. These tracks above Henderson Street are part of the switching proposition below Henderson Street?

A. Yes sir.

Q. And eventually those tracks will be connected with industries along the front and with wharves?

A. Yes sir.

Cross-examination of Mr. RANDOLPH:

Q. You haven't built your storage tracks there because you have been short of money I suppose?

A. No sir, there is no room out there to build storage tracks.

Q. Is there any other place where you could have storage tracks except at that point strictly speaking?

A. Well, no sir, there is not; I would like to qualify that answer; there is room possibly at the Toledano Street wharf, where we might have storage capacity for about twenty cars.

Q. Your organization and plan contemplates what you have always understood as a double Belt Railroad track system?

A. Yes, sir.

Q. You don't mean to tell this Court that you are just going to

have a single track Belt Railroad system in the City of New Orleans,—I mean as a practical proposition. Isn't that a temporary situation there?

A. I don't know that it is for this reason, as I said from the protection levee to Toledano Street there is no room for any other track.

Q. You don't mean to say that the Public Belt Railroad authorities which has the arm of the City of New Orleans if it
214 found it expedient could not put that where it chose,—you don't deny that?

A. Not unless they wanted to take some tracks from the other railroads.

Q. But there are places there?

A. Not in that immediate neighborhood.

Q. Is there not vacant property all around there where this track is used as a storage track?

A. From Napoleon Avenue to Toledano Street the vacant property belongs to the Illinois Central Railroad property.

Q. It is vacant, is it not? I didn't ask you who it belonged to?

A. I don't exactly understand what you mean?

Q. It is not occupied?

A. Yes, it is.

Q. With what?

A. Tracks.

Q. Across the track is not there other property too?

A. There is none.

Q. Don't you know that the City of New Orleans has the authority to condemn property for public purposes if it sees fit?

A. I don't know.

Q. You state as a fact that you are using one of these Belt Railroad tracks as a storage track?

A. Yes sir.

Q. Did I understand you to say that the physical ability of the Public Belt Railroad authority to take care of the business and the business of all railroads coming in here has reached its maximum capacity?

215 A. No, I would not say that; I was simply talking about the present conditions.

Q. You could take care of more if you saw fit to do so?

A. Oh yes; we could take care of more than we are doing now.

By Mr. MILLING:

Q. Is there not plenty of room back of the City here for building storage tracks?

A. Yes, I imagine so.

Q. I mean on the line of your contemplated Belt road?

A. Yes sir, I think so.

Q. When you get your Public Belt system completed if there is any increase in the commerce of this City, you will have a hundred times the number of cars that you handle to-day?

A. Yes, I think so.

Q. And then you will have to have some storage tracks somewhere?

A. Yes sir.

Q. And you will not store them on the tracks between Toledano and Henderson Streets?

A. It takes up all the available space to do the season's work.

Q. You handle cars of the Louisiana Railway & Navigation Company?

A. Yes, sir.

Q. And you can continue to handle them whether you handle them with your own crew or with their crew?

A. That is a hard question to answer, just yes or no. There are other conditions that enter into this proposition relative to the Louisiana Railway & Navigation Company handling their
216 own cars, while I grant that we only handle the L. R. & N. once a day, as a matter of fact we pull interchanges once a day for all of the railroads with the exception of the North Eastern twice, and it is closer and they give us a track in their own yards to operate on; consequently, they are entitled to more consideration on that account because we relieve their own tracks.

Q. Do you operate your Belt railroad on that track?

A. No sir; it is an interchange where they place the cars for us and we place them back for them, and that is in their own yards. We go to the Louisiana Railway & Navigation Company and get ten, twenty five or thirty cars and those cars are cared for at different points on the Belt line. It is necessary for me to explain it this way. We get cars, tagged for Third and Pleasant, Ninth and Harmony. We have a track at Mandeville Street, which is a wharf track; the Leyland line has another wharf track, and those cars are handed to us in a bunch. We have to have room to switch them, and we have to bring twenty or twenty five cars to the Illinois Central in order to switch them out on those tracks. When we start down the volume of business that we do for these particular tracks is larger than the capacity of that particular track, to take care of that at that particular time, and consequently we have to bring cars down to the neighborhood of Toledano Street, on the whole track, all made up, and wait sometimes one day and sometimes two and three days before there is vacant room on those tracks to place those cars. Consequently, the Louisiana Railway & Navigation Company, sending twelve cars down on their own
217 engines they would be stuck there, and they would have to drop the cars and get off.

Q. If you had the management of that situation when you had your yard full, would you not tell them that you could not send the cars down? In other words, would you leave them on the interchange tracks until the switches were open and you could place the cars?

A. No sir.

Q. Suppose they were granted that as a right of way to go over those tracks under the supervision of the Belt Railroad, and if the Belt did manage it, do you mean to tell me that they would manage

it in such a manner as to have switch blocks so you could not get into it?

A. If we would hold those cars up on the interchange the same condition would obtain as if we tried to bring them down, because the following day we would have an accumulation and we would have to have an ideal condition and I have never seen it on the river front when each track would have room enough to place the different cars.

Q. The point is that you have not room enough to do the business of the Louisiana Railway & Navigation Company and the business of the other railroads?

A. No sir, that is not it.

Q. If Mr. Edenborn was permitted—if he was to be confirmed in his rights, as he claims under the ordinance and built his yards at Willow Grove landing, would not that to a great extent relieve the situation as far as blocking the cars on the Belt is concerned?

A. In places where there is more trackage and yardage it would certainly relieve that position if he was in a position to hold those cars, say, ten days, it would certainly relieve the situation?

218 Q. As far as he is concerned he would have a big yard just above the Protection levee and if he was in a position to unload at the landings, don't you know that those cars could be held at his yard, at the upper protection levee and brought down when it was possible to unload them?

A. Yes sir.

Q. If he had more room than you did you would require him to keep the cars there until they could be unloaded wouldn't you?

A. You speak about his having a large yard and wharfage and holding his cars up there; that would never relieve the condition of holding those cars up there until we were ready to take the cars, unless we simply wanted to handle the L. R. & N.'s business. We cannot tell twenty four hours ahead what cars we are going to get from any particular point.

Q. Are you not handling the Louisiana Railway & Navigation Company's business now?

A. Yes sir.

Q. When the equipment reached the track of the Public Belt and that equipment together with the crew was taken under control by yourself, and they were ordered to place those cars along the switches of the Belt, whether you cut that engine loose or put your own engine to that equipment, is there any difference?

A. As I understand it, as we now arrange it, with our own engine, we have a certain time for doing that switching, and for making up we know exactly the conditions every day.

Q. Wouldn't you know that same condition if the Louisiana Railway & Navigation Company had the right to run its equipment over your road?

219 A. Yes, but it would complicate it?

Q. How?

A. If we were handling business for other lines and tried to go into some switch—the same switch, and the L. R. & N. would come

to get in with a single track that we have, while it would not create any wrecks it would create confusion and would cause delays even to the L. R. & N., and they would be liable to be there to-day and remain all day without any attempt of the Belt to delay them.

Q. You say that the L. R. & N. when run down would mix which your train; how is that possible if the L. R. & N. were not permitted on those tracks except upon certain rules and conditions that are observed by yourself and prescribed by yourself?

A. The mere fact that they have a miscellaneous train to go to the different points on the Belt because there would be two engines working on the same switch tracks.

Q. You would get the tracks clear of one engine before you got another one?

A. Yes, but how are you going to do that and give the L. R. & N. a square deal; according to that line of reasoning when at any time when their trains come in they want to go in this prospective yard and make up this train; we have been going on the assumption that anything for the Belt road winds the business up; that is the way the cars are delivered to us by all lines coming down from there which is the junction point in solid trains. That would not mean a solid train for any particular wharf or switch track on our line.

220 Q. Suppose the L. R. & N. should bring a train say of fifty cars to the upper protection levee and call on the Belt authorities who would come forward with the engine and crew, with all of the people necessary to run a train, but employes of the L. R. & N., and you were to put your own employes on that same engine and that same train, tell me whether or not it would be possible for you to run it over the Belt tracks and distribute the cars to the various switches in the same manner and just as practically as you could with your own engines?

A. No sir, for the reason when our engine goes up there to take those cars they find those cars going to points that are congested, and there is no room, and that is the reason I spoke about the whole track. They switch as many cars going to some particular point and put them in direct order on the Belt proposition and wait until possibly the next day. They may only take, say they had fifty, and only take ten, they know that they have room at Harmony and Pleasant and they may drop some of the cars and place ten cars and go down again and possibly the next day there may be some place not so congested, and go and get the other thirty or forty cars and place them; there is no time where we can go to the L. R. & N. and bring thirty or forty cars at one time and place them at their destination, possibly in twenty four and thirty six hours.

Q. Do you know when you go and get the cars whether or not there is room to place them?

A. I don't know how to answer that question; that question cannot be answered directly.

221 Q. Suppose that the Belt road had the capacity to take care of the business and suppose that you were to be turned over a train with the engine hooked to it, as I have described already,—I want to know whether or not you would be able to distribute those

cars with that engine just as well as you would with your own engine?

A. The Belt road is able to take care of all of the business that is offered, and it has done so.

Q. Taking up the question I asked you a while ago in which you answered No, and then you explained, would not the very same conditions arise if you detached the engine of the L. R. & N. and put a switch engine on it?

A. I think I have answered the question; you asked me if I could not handle those cars with a switch engine by taking off the L. R. & N. crew.

Q. No sir, I asked you if you could not handle the engine of the L. R. & N. if you put your own men on, and you said No; I want to know why you could not handle them with the L. R. & N. engines, and you could handle them with the engines of the Belt road? Would it make any difference the fact of having an L. R. & N. or a Belt engine?

A. No sir, no difference.

Q. If the employes of the Louisiana Railway & Navigation Company absolutely followed your directions and instructions would it make any difference whether you handled that engine with the crew of the L. R. & N. or the crew of the Public Belt Railroad?

A. In that way, no sir.

Q. Do you know Mr. Dunn, the gentleman who testified in this case?

222 A. Yes sir.

Q. Did you ever work under him?

A. Yes sir.

Q. How long have you worked under him?

A. About ten or twelve years.

Q. Did you go from his employ to that of the Public Belt Railroad?

A. No sir.

Q. Where did you go from there?

A. I went to the fourth District State Tax Collector's office.

Q. And from there you became Superintendent of the Public Belt?

A. Yes sir.

Q. You did no Railway work since you worked under Mr. Dunn and took charge of the Public Belt?

A. No sir.

By Mr. RANDOLPH:

Q. How long were you in the Tax Collector's office in the interval?

A. Eight years.

Q. This switching that you spoke of where sometimes there is congestion, that is below Toledano Street?

A. Yes sir.

Q. There is no switches between the upper line of Audubon Park

where the Belt Railroad commences and what is known as Willow Grove landing?

A. No sir.

Q. Then there is nothing in the way of your movement of solid trains from the connection of the L. R. & N., down to Willow

223 Grove landing?

A. Only that we have a team track at Millaudon Street.

Q. That don't interfere with the main line?

A. Yes sir.

Q. Is the team track a separate track from the main line track?

A. No sir; not with us; we are using the main line as a team track.

Q. Between upper Audubon Park and Willow Grove landing haven't you got a double line track?

A. Yes sir.

Q. Are both used as team tracks?

A. No sir, only one.

Q. What is to prevent you from bringing a train down to Willow Grove landing?

A. Well, one is used as a storage track.

Q. One is used as a storage track between the L. R. & N. connection and the Willow Grove landing?

A. Yes, I want to explain one thing.

Q. Is that intended for a permanent storage track or is it a temporary arrangement?

A. We have no other place for storage.

Q. You don't know whether the Belt authorities are going to get any other place out there for the storage of cars?

A. Not out there.

Q. Haven't you already issued an embargo on the movement of cars, even though you have exclusive control there and do not permit any other engines to come on except your own engines? In other words there has been a great congestion already?

A. Yes sir.

224 Q. Then you still persist in using one of your double main tracks as a storage track?

A. We can't help it.

Q. You haven't got any other facilities except to use that as a storage track?

A. That is all.

Q. Well, suppose you had a hundred thousand dollars in the treasury don't you think you could get a place for storage?

A. That one of it I don't know anything about.

Q. You know practically whether that would be true or not?

A. I suppose they could buy property.

Q. Supposing we paid you a hundred thousand dollars; you are a practical man, you know you would have funds to provide yourself with the facilities, wouldn't you?

A. Yes sir.

Q. How many engines have you now?

A. Four.

Q. Under the ordinance of the Louisiana Railway & Navigation Company we are going to furnish you with engines to move our stuff; is that advantageous or not to the Public Belt to have more engines?

A. Ordinarily, but I would not say always.

Q. Under our ordinance we claim that we will supply you not only with cars but with an engine and with men to man the engine, and all under your orders. Now, would not that increase your facilities for moving cars?

A. Along that line it would.

By Mr. GILMORE: That would increase your ability to
225 handle thir cars?

A. Yes sir.

Q. But it would not increase your ability to handle the cars of other railroads?

By Mr. MILLING: We object; that is a matter of argument.

By Mr. GILMORE:

Q. But that would not help you to handle the cars of other railroads?

A. Yes, it would.

Q. How?

A. Because we would not have to use our own engines to handle the Louisiana Railway & Navigation Company's cars.

Q. Would it give you any greater facilities than if the Belt Railroad obtained engines of its own?

A. No sir.

Q. How many railroads do business with the Public Belt Railroad?

A. All of them in the City except the Terminal Company.

Q. Every railroad that comes in the City of New Orleans does business with the Belt?

A. Yes sir.

Q. They all have interchanges with the Belt?

A. Yes sir.

Q. They all operate with the Belt using its own locomotives and cars?

A. Yes sir.

Q. As that business increases necessarily you will have to have more locomotive power?

A. Yes sir.

Q. Is not the real reason why it is impracticable to allow
226 the engines of the Louisiana Railway & Navigation Company to occupy your tracks is that all of the tracks from Carrollton to the lower end have to be used for the business of all the railroads?

By Mr. MILLING: Objected to on the ground that this is not only leading, but counsel is really testifying for the witness.

By the COURT: The objection is over-ruled.

A. Yes sir.

Q. These tracks from Henderson Street up are not main tracks for the operation of trunk lines railroads, are they?

A. No sir.

Q. Simply switching tracks?

A. Yes sir.

Q. To be used for the entire business of the Public Belt?

A. Yes sir.

Q. Without preference to any railroad?

A. Exactly.

Q. In addition to the railroads that you do business with have you any exclusive wharf connections?

A. Yes sir.

Q. So you have to serve steamships along the river front?

A. Yes sir.

Q. Then you have industries and connections along the river front and in the heart of the City and on the Julia and Commerce Street switches which you have to serve?

A. Yes sir.

Q. Isn't there an interchange track with the Illinois Central above Henderson Street?

A. Yes sir.

227 Q. Don't you do a tremendous business with them?

A. Yes sir.

Q. And this is in the very territory that those gentlemen claim the right to operate their engines?

A. Yes sir.

By Mr. RANDOLPH:

Q. How many deliveries, interchanges, a day, do you get over the Illinois Central?

A. One.

Q. Are there any wharves above Toledano Street?

A. Not that we serve.

Q. Are there any switches above Toledano Street?

A. Only as I said before our main line we use as a team track.

Q. Suppose the Colorado Southern comes in here, could you accommodate them over your Belt?

A. Yes sir.

Q. Could you handle their cars?

A. Yes sir.

Q. Then the Belt has not reached its maximum of public service?

A. No sir, not yet.

Q. And you can handle a great deal more business than you handle at the present time?

A. Yes sir.

Q. Then, why do you say that there would be so much congestion and so much delay in handling the present cars of the Louisiana Railway & Navigation Company?

A. I don't know how to explain that except to say that you cannot get a gallon in a quart measure.

228 By Mr. MILLER:

Q. You say that this switching proposition,—it is a fact however, that you are operating at this time under the rules of the Interstate Commission?

A. Yes sir.

Q. And you are treated as an independent line?

By Mr. GILMORE: They are not treated as anything except a switching proposition by the Interstate Commerce Commission.

By Mr. GILMORE:

Q. Haven't you handled all of the business with your own equipment that has been offered to you by the Louisiana Railway & Navigation Company?

A. Yes sir.

By the COURT:

Q. From the testimony that you have given and that of a number of others, I gather, that eliminating this question of parking the cars up town, and giving you a storage yard that the real difficulty of operating these two sets of engines on the same tracks will be below Willow Grove landing?

A. Yes sir.

Q. Above that the difficulties would not be so great?

A. No sir, except at Millaudon Street; we use that as a team track.

Q. Granting that you had a team track out there to unload on and granting that you had a place to park the cars temporarily, this question of sending engines backwards and forward and having to occupy the tracks all of the time, really occurs below the Willow Grove landing?

A. Yes sir.

229 SAMUEL L. GILMORE, Esq'r, recalled.

"I would like to state that the Interstate Commerce Commission has not classed the Public Belt Railroad as a trunk line railroad but is dealing with it only as a switching proposition, and the only rule ever made by the Interstate Commerce Commission was an informal ruling that the Belt was under the jurisdiction of the Commission, but that ruling has been suspended subject to the right of the City and the Railroads dealing with the Belt road. I have had the question taken up de novo to be fully decided; I will add further that the rules of the Car Service Association and of the Car Builders' Association have been adopted only by agreement between the trunk lines and the Public Belt, which was revocable at the pleasure of the Public Belt, the Public Belt not being in any way a member of either of the Associations.

By Mr. MILLING:

Q. Is it not a fact that at the time of the opening of the Public Belt that you had to go to Washington about some matters that you are testifying about?

A. Yes, I consulted the Chairman of the Interstate Commerce Commission.

Q. Is it not a fact that the Interstate Commerce Commission agreed to hear you further on the question, but that in the meantime they would treat your railroad as an independent line?

A. No sir; I went to Washington and saw the Chairman
230 of the Interstate Commerce Commission, and stated to him that we had agreed to abide by the car service rules, and we desired a rehearing, and that we had an agreement between ourselves so as to avoid any controversy and would submit our rules for their approval; but they have done nothing as yet.

Q. And you have filed your schedule with them just as any other railroad has?

A. No sir; every road has filed its schedule with a recognition of the jurisdiction of the Interstate Commerce Commission. The City of New Orleans for its Belt Railroad has not recognized in any way the jurisdiction of the Interstate Commerce Commission but has filed its schedule subject to the reservation of the question of jurisdiction and to carry out the agreement made with the trunk line.

Q. If the Interstate Commerce Commission persists in its present ruling then you will be treated as an independent carrier?

A. We would be treated as a switching proposition, and the Interstate Commerce Commission have declared, through its chairman that it will make special rules for the government of switching roads.

By the COURT:

Q. The sum and substance of what you say Mr. Gilmore is, that whether the Interstate Commerce Commission has or has not jurisdiction over the Public Belt, it has a way of enforcing its wishes through the pressure on the trunk lines?

A. Yes sir.

NOTE.—With the privilege of taking the testimony of Frank T. Mooney out of Court the City closes.

(Testimony closed.)

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FRIDAY, April 2nd, 1909.

Testimony and Notes of Evidence Taken by Consent on Friday, April 2nd, 1909, in the Office of Messrs. Foster, Milling & Godchaux. No. — Godchaux Building, New Orleans, La., on Behalf of Plaintiff in Rebuttal.

Present:

For Plaintiff: Sam'l L. Gilmore, Esq. of Counsel and H. Garland Dupre, Esq., Assistant City Att'y.

For Defendants: Mr. Milling, of Foster, Milling & Godchaux, and Mr. Randolph, of Weis, Randolph and Randall.

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FRANK T. MOONEY, who being first duly sworn on behalf of Plaintiff in Rebuttal, did testify as follows:

Direct examination by Mr. GILMORE:

Q. Mr. Mooney, what is your business?

A. Trainmaster Illinois Central Railroad Company.

Q. How long have you been in the employ of the Illinois Central Railroad Company?

A. Twenty six years.

Q. In what capacities have you served with that railroad?

A. Flagboy, watchman, engine foreman, yard master, general yard master and train master.

Q. In the course of your experience as a railroad man with the Illinois Central Railroad Company, have you obtained practical knowledge of the handling of trains and cars and particularly of the switching of cars?

A. Yes, sir. My entire service with the Company has been in the switching service.

Q. You had charge then of the practical operation of the switching service in the yards of the Company?

A. Yes sir.

Q. In their entire system in the City of New Orleans?

A. Yes sir.

Q. Did you ever have any connection with the practical operation of the old Shreiber Belt that was operated through Louisiana Avenue and St. Joseph Street by the Illinois Central Railroad Company?

A. Yes sir, for at least fifteen or sixteen years.

Q. You know all about the switching of cars, freight cars and passenger cars?

233 A. Yes sir, I am thoroughly familiar with it.

Q. Are you acquainted with the character of the Public Belt Railroad system along the river front?

A. Yes sir.

Q. Were you in the employ of the Illinois Central Railroad while it was being built?

A. Yes sir.

Q. You have been in its employ ever since its construction and operation was begun?

A. Yes sir.

Q. Do you know the character and location of the tracks of the Public Belt Railroad system along the river front?

A. Yes sir.

Q. You know the character and location of the tracks of the Illinois Central Railroad along the river front down to St. Joseph Street?

Q. How many tracks has the Illinois Central Railroad between the upper Parish line and the Stuyvesant docks?

A. Two main line tracks.

Q. Would it be practicable for the Illinois Central Railroad system to be operated over those two tracks if the Belt Railroad system also operated over those tracks?

A. No sir.

Q. Would it be practicable for the Belt Railroad system to be operated over the Illinois Central Railroad's two tracks even if the Illinois Central Railroad was given the right to make rules for the government of the Belt Railroad system?

A. No sir.

Q. Is it practicable to operate the Public Belt system over its own tracks if any other railroad, and particularly the defendant railroad, is allowed to operate its through trains or its locomotives over the Belt tracks?

A. No sir.

Q. Will you give the reasons for your opinion in that connection?

A. Yes sir. The track location on the Public Belt is practically single track; while they have two tracks only one of the tracks is used as storage tracks for placing cars for teaming and unloading purposes, and the other track is used as a switching load or removal track.

Q. Has not the Illinois Central an interchange track with the Public Belt above Toledano Street?

A. Yes sir.

Q. Where is that interchange located?

A. The Illinois Central Railroad's connection with the Public Belt is at Millaudon Street.

Q. Is that interchange used by the Belt Railroad for switching and belting purposes, I mean belting cars of the Illinois Central Railroad?

A. Yes sir.

Q. Is it constantly in use?

A. Yes sir.

Q. Is not the Public Belt railroad system, as you know it as established, merely a system of switching tracks or switching system as distinguished from main line system?

A. It is an entirely different proposition from main line double track system.

Q. Is not every part of the trackage of the Public Belt railroad system at times necessary to be used to operate other parts of the Public Belt system?

235 A. Yes sir.

Q. Is not the Public Belt system of tracks practically similar to a railroad switching yard?

A. It is what we would term a double lead to a yard.

Q. If the Public Belt Railroad system makes connection with wharves or industries along the river front between Henderson Street and the upper Parish line by switch tracks, will this not necessarily require the use of all existing tracks for switching purposes above Henderson Street?

A. Yes sir. And in addition to the present facilities it would be necessary to increase the facilities to render service satisfactory to the patrons.

Cross-examination by Mr. MILLING:

Q. What road you say you are connected with?

A. The Illinois Central.

Q. Do you know Mr. Dunn, the gentleman who testified yesterday?

A. Mr. Dunn is Superintendent of the Illinois Central Railroad Company.

Q. Is he higher in authority than yourself?

A. I report direct to Mr. Dunn.

Q. Quite competent railroad man, isn't he?

A. Yes sir.

Q. Now, if I understand you you say that the cars and the equipment of the Louisiana Railway & Navigation Company could not be operated over the Belt because they use one or their tracks as storage tracks; suppose they got other tracks, what would be the result?

236 A. They would still need the two main lines to move the business to and from its organization point.

Q. Our proposition is that the Belt Railroad itself is to move our cars, or our cars be moved under their direction—for instance when our trains gets to the upper City limits it will be then turned over to the Belt Railroad and be pulled into the yards under their direction. They shall state when it shall be admitted upon the Belt tracks—Can you conceive of any confusion in reference to that?

A. I will answer that from practical experience that no road could specify any particular time that the switching movement could take place; as to the time their train could get there, and in addition to that if the train was short, and the Belt Railroad had no given point—unless they had an exact time—that they could not get in touch with their switch engines that would be working between the upper Parish line and any other point of the Belt,—to notify them that this train was there and ready to be moved. I answer that from daily experience that I have had in handling our own trains when such conditions warranted it.

Q. Don't you handle other people's cars over your road?

A. Any one's cars, yes sir, with our own engine, under our own direction, whenever we care to move them; we don't handle any train, switch trains, from other roads, in our yards.

Q. They are operating four engines over the Belt Railroad; could they operate five?

A. That would depend on what those four were doing, and not the particular section of the Belt they were working on.

237 Q. I understand that two engines could not operate on the same spot at the same time?

A. You may have five hundred feet of space on a track, with so many cars to be unloaded in. I will illustrate. Say on the Public Belt, at the Harrison line wharf, if a ship was taking a cargo of twenty five thousand bales of cotton the Belt Railroad with all their engines could not handle that cargo with the same movement as the Illinois Central could in the same space.

Q. Why?

A. Because they haven't the facilities to pull the empties and place the loads, or store the empties or store the loads for prompt discharge of the cars on the wharf. I am answering your question as to why five engines could not do the work.

Q. Can they work three engines?

A. Yes sir.

Q. And they can work four?

A. Yes sir.

Q. They could work ten—suppose they borrowed an engine from some one, could they work that?

A. Yes sir.

Q. Suppose they were to borrow an engine from the L. R. & N. could they work that on the Belt?

A. Yes sir.

Q. Suppose the L. R. & N. on the upper Parish line on some occasion when all the switch engines were busy at the other end of the line were to loan the Public Belt an engine to handle, say, twenty five or thirty, forty or fifty cars over the Belt, do you think the Belt could take that engine and cars and switch them?

238 A. If the engine or a train of cars, say, thirty or fifty cars was tendered to the Public Belt at the upper Parish line, and all the other Belt engines were working on the lower end of the Belt the movement of this loaned engine would not interfere with the operation.

Q. Would it interfere with the operation if they were not only to borrow the engine but to borrow the crew of the L. R. & N. who are under their direction?

A. Yes sir, in the first place it would be necessary for the crew of the L. R. & N. to be familiar with the rules of the Belt, track conditions and other conditions.

Q. Suppose they were familiar with all those conditions and the rules?

A. They could operate that one train with the other engines if the other Belt engines were on the lower end.

Q. Well, suppose instead of the other engines being on the lower and they were on the double track which was being used for running trains one way, and the other track was used for running them down the river.

A. In switching industry tracks and handling business and switch

movements as compelled to do between the upper Protection levee and Napoleon Avenue, we will say, it is necessary for engines to work in both directions,—for instance an engine may be going North and will have to use a portion of the South bound track in reverse direction to get to the switch tracks or cars for teaming or other purposes on the other track.

Q. But it is a fact Mr. Mooney that they handle the cars of the L. R. & N. to-day, and would it make any difference whether they handled them with borrowed engines or one that they owned?

239 A. Yes sir, it would make a material difference.

— Kindly explain.

— I have charge at present of the entire Belt from St. Joseph Street to the upper Parish line or Southport, of the Illinois Central Railroad. We handle cars for every railroad entering the City of New Orleans to different points on the Belt, and we could not permit the other roads to run their engines or trains over our tracks and give a good service, or do the business in a practical way as we do at present by switching with our own engines.

Q. Suppose instead of owning the engines you had simply borrowed the engines?

A. If a Northeastern engine will work on an Illinois Central Railroad track, it is just the same as one of our own engines. If we had our own crew and our own cars, I mean by collecting the other lines of cars, that we switched those cars with another engine, or with a North Eastern engine, or any engine, they would be under our direct supervision all the time.

Q. Then could you not handle them without regard to whose engines or cars were upon the track just so they were under the supervision of one controlling body?

A. I can explain that by saying that one engine will do all our switching between Southport and the Stuyvesent Docks and handle fifty or sixty cars a day, when if three engines were put in there they would not be able to do as much work as one engine would in that particular territory.

Q. You haven't got the facilities have you?

240 A. We have all the facilities that are necessary to handle the business as it is offered to us, or as we receive it, originating on our own lines or other lines? Tell me what you want and I can answer. I am answering the question from a practical railroad standpoint. Mr. Milling and not—you are trying to bring out the fact of a loaned engine and a loaned crew.

Q. I am trying to prove by you, if I can, that every track, or every double track, or every triple track, has got the capacity to handle only so many cars and engines?

A. That depends, from a practical standpoint, as to the speed of the track and the track conditions. For instance we have double tracks from New Orleans to Kenner Junction where we handle over sixty trains a day. We could not handle the same amount of trains over the track of the Belt along the river front.

Q. That goes back to the original proposition—the capacity of this particular car at this particular place necessarily—

A. I want to answer your question, Mr. Milling—

Q. How many roads come in over the Illinois Central Railroad tracks in the City of New Orleans?

A. Three; the Illinois Central; the Yazoo & Mississippi Valley from Kenner Junction; and the Southern Pacific from the incline at Harahan Junction.

Q. Those two roads run freight and passenger trains from there into the City of New Orleans?

A. The Illinois Central and the Yazoo & Mississippi Valley yes sir.

Q. They have been doing so for some time?

A. For ten or twelve years.

Q. They operate without any confusion?

241 A. Yes sir, they do.

Q. You've got your independent tracks on the river front. It is preferable for you to handle your own business than to give it to the Belt?

A. Yes sir.

By Mr. GILMORE:

Q. Now, Mr. Mooney, the three railroads that operate into the Union Station operate over main line tracks?

A. Yes sir.

Q. And on schedule time?

A. Yes sir, on time table and train hours.

Q. No locomotives except those of the Illinois Central Railroad operate over the switch tracks or belt tracks of the Illinois Central between Southport and Thalia Street?

A. No sir.

Q. Is not that the difference between the main line system and the switching system?

A. Yes sir, as I stated to Mr. Milling,—the condition of the track and the speed of the track.

Q. If the tracks of the Public Belt Railroad were main line tracks between Henderson Street and the upper Parish line, of course there would not be any difficulty in operating through trains of a number of railroads over them, would there?

A. No sir. If they were main line tracks and had separate industry tracks and leads that engines or switching would not be compelled to use, the main line, it would then be practicable to operate additional engines on the main line without interfering with the operation.

242 Q. Then the reason why the Public Belt tracks on the river from between Toledano Street and the upper Parish line must be operated by the Public Belt Railroad is because they are needed for switching purposes above and below Tolendano Street, and will be further needed as connections are made by the Belt with the public wharves and industries?

A. Yes sir.

Q. Would it be possible for the Public Belt Railroad system to make any kind of an arrangement or schedule with the defendant company by which its trains would be allowed to run over these public Belt tracks?

A. No sir.

Q. Mr. Dunn has been in the employ of the Illinois Central Railroad Company for a long time?

A. Yes sir, since 1892.

Q. Has he for many years had any practical operation, or anything to do with the practical operation of the switching business of the Illinois Central Railroad in New Orleans?

A. Mr. Dunn in his position as Superintendent has supervision indirectly over all men in the switching service, but directly he does not have anything to do with the switching, that is, to go out and see that it is done, nor to be in the yards as much as the train-master, or the yard master, or the general yard master.

Q. Could you operate your switching system on the river front even with your own locomotives successfully unless you had an absolute right to select such cars as you desired to switch at any moment?

A. No sir.

243 Q. Could you arrange your switching operations on those tracks so that you could take the cars of one Company as distinguished from others at fixed times in the day or night?

A. No, for the reason that in handling that class of business, particularly export business, weather conditions affect it a great deal. As an illustration: In handling large vessels at Stuyvesant Docks we may unload seventy five to one hundred cars of cotton for one ship, and the next day if it rains we would not handle any, and in consequence if you are handling business on a public belt of that class, and their lines would be tendering you cars, it would cause a congestion on your railroad.

NOTE.—Testimony closed. Case Continued for argument.

A true and correct report—

(Signed)

A. E. OLIVERA,
Stenographer.

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Division "C," Civil District Court.

No. 79743.

MARTIN BEHRMAN, Mayor, et al.,

vs.

LOUISIANA RAILWAY & NAV. CO.

Testimony on Behalf of the Defendant.

Filed April 19th, 1909. (Signed) Joe Garidel, D'y Cl'k.

244½

Division "C," Civil District Court.

No. 79743.

MARTIN BEHRMAN, Mayor, et als.,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

Testimony and Notes of Evidence Taken in Open Court on the Trial, Before the Hon. John St. Paul, Judge, on March 25th, 26th, 31st, and April 1st, 1909, by A. E. Oliveira, Stenographer, on Behalf of Defendants.

Appearances:

For Plaintiff: Sam'l L. Gilmore, Esqr., of Counsel; H. Garland Dupre, Assistant City Attorney.

For Defendants: Mr. Milling, of Foster, Milling & Godechaux, & Brian, and Mr. Randolph, of Weiss, Randolph and Rendall.

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THURSDAY, March 25th, 1909.

Testimony for Defendant.

By Mr. MILLING: On the plea of res adjudicata we desire to offer in evidence ordinances Nos. 1516 and 1997, already offered in evidence, and we offer in evidence the record in the suit No. 69888 entitled: "Paul Capdevielle, Mayor, vs. The New Orleans & San Francisco R. R. Co., being the petition, answer and judgment and the judgment and decree of the Supreme Court of Louisiana.

By Mr. GILMORE: Objected to; you were not parties to this suit. This is a suit between the City of New Orleans and the Frisco road, and it is res inter alios acta.

By the COURT: The objection goes to the effect.

By Mr. GILMORE: We reserve a bill of exceptions.

By Mr. MILLING: We next offer in evidence the application and brief of Foster, Milling, Godechaux & Sanders, Counsel for the Shreveport & Red River Valley R. R. filed in that suit, marked D 1.

By Mr. GILMORE: We object to that on the ground that there were not counsel for the Louisiana Railway & Navigation Company, and that that application was not made by the Louisiana Railway & Navigation Company, and there is no appearance in the Supreme Court of this Company.

By the COURT: The objection goes to the effect.

By Mr. GILMORE: The City reserves a bill of exceptions.

246 By Mr. MILLING: Mr. Gilmore will you admit that the Shreveport and Red River Valley is the proper name of the Louisiana Railway & Navigation Company?

By Mr. GILMORE: I cannot admit; I don't know it.

By Mr. MILLING: On the judicial estoppel we desire to offer in evidence suit No. 69984 entitled "Board of Port Commissioners vs. The New Orleans & San Francisco Railroad Company, being the petition of the plaintiff and the answer of the defendant and the answer of the City of New Orleans, through its attorney, and will ask you, Mr. Gilmore, if you will, as it is easier for you to get than us, the resolution by which Judge Lazarus was employed.

By Mr. GILMORE: I object to this record in so far as it is offered in support of the plea of estoppel and res adjudicata, and also object to the record in the case of Capdevielle, Mayor, vs. the Frisco, not only on the ground that this party is not a party in any way to this suit, but on the ground that it does not form a basis of res adjudicata or estoppel.

By the COURT: The objection goes to the effect.

By Mr. GILMORE: We reserve a bill of exceptions.

By Mr. MILLING: We next offer in evidence a resolution of the City Council extending the time in which to complete the Belt Railroad on account of litigation, marked B 2.

By Mr. GILMORE: We object to the copy of the resolution offered by the gentleman on the ground that it is not properly certified; it is not a copy made by the proper authority; it is a letter written by the General Agent of the railroad to its
247 counsel.

By Mr. MILLING: Strike that out; I will furnish a certified copy;

By Mr. GILMORE: I have not been able to find it and I have had search made for it.

By the COURT: The objection is well taken until the proper copy can be furnished.

By Mr. MILLING: We next offer in evidence certified copy of an act accepting the ordinance No. 1997 by the Louisiana Railway & Navigation Company, passed before Fred Zengel, City Notary on the 17th of September, 1903, marked B 3, together with the resolution of the Board of Directors of the Railway Company. We next offer in evidence a letter from the Louisiana Railway & Navigation Company, signed by William Edenborn, President, of date May 15th, 1906, addressed to the Hon. The Mayor and Members of the City Council, marked B 4. We next offer in evidence letter of the Louisiana Railway & Navigation Company, signed by William Edenborn, President, dated May 15th, 1906, addressed to the Hon. Martin Behrman, President of the Public Belt Commission marked "B 5.

We next offer in evidence copy of receipt given by Henry M. Young, Trust Officer of the Interstate Trust & Banking Company, Fiscal Agent of the City of New Orleans, of date Nov. 10th, 248 1905, for \$50,000.00 worth of bonds, marked B 6.

By Mr. GILMORE: We have no objection to this to prove the deposit, but we take the position that is not binding on the City of New Orleans as the City took no action in connection with the making of that, and it was done by the Railroad Company in connection with the Interstate Bank.

By the COURT: The objection goes to the effect.

By Mr. GILMORE: We reserve a bill of exceptions.

WILLIAM EDENBORN, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. MILLING:

Q. Mr. Edenborn, what official position do you hold with the Louisiana Railway & Navigation Company?

A. I am its President.

Q. Who is the principal stockholder?

A. I am, sir.

Q. When did you first contemplate building your railroad into the City of New Orleans; how long ago has it been as near as you remember?

A. I considered that subject as far back as 1900.

Q. When did the matter first begin to be discussed or talked about between yourself and the citizens of New Orleans or the commercial bodies of New Orleans or their representatives?

249 A. I have been approached by various people from 1900 on in the City of New Orleans; when I came here and elsewhere you see I lived at that time in New York but came here occasionally.

Q. Well, now, Mr. Edenborn, please explain to the Court what caused you to bring your road to the City of New Orleans. Just go

ahead and state the representations that were made, and what forms, etc., etc.?

A. The first act of importance was a visit by Mr. Castles formerly President of the Hibernia National Bank, calling on me in the City of Chicago, and asking me where I intended to build my railroad. That the citizens of New Orleans had wished for me to build a piece of road from Shreveport down, whereas he asked me if it was my intention to build to New Orleans. I said No, because the first idea was to build to New Orleans and he said if I could find my way clear to come to New Orleans he thought it was the proper way for me to go to the City of New Orleans; that New Orleans was an important City and Port and they would make it very attractive, and the citizens were anxious to obtain some railroads down here; and during the conversation we spoke about railroad facilities and buildings that were going on over the country, and I asked some question regarding New Orleans. I said: Would they vote a substitute like Shreveport has done. He said: He didn't think they would but they undoubtedly would give me such facilities as I would need.

During the conversation I asked him if all of the railroads
250 were leading to the wharves on the river. He said he thought they did; I asked him about property in the City of New Orleans. He said it — very cheap considering the importance New Orleans was and would be, and I asked him if the feeling of the people was such that a subsidy could be gotten, whether they would do that. He said that he thought they would not consider that but that other facilities would be granted, he feeling convinced that the business community being anxious to increase the business of the Port and City would grant me or any other railroad that would build into the City all necessary facilities; and in his opinion I could buy property at that time at pretty low figures so as to get terminals.

Q. What connection did Mr. Castles say that he had with the Progressive Union of this City?

A. Mr. Castles said he was on a Committee or a Director or something in the Progressive Union?

Q. State whether or not there were any other assurances or representations made to you?

A. I remember another occasion. After the completion of my branch over the Red River at Alexandria, the citizens felt jubilant and at that occurrence there was present at that meeting of the citizens a Mr. Zachary, I think he was a councilman; if my memory serves me, of the City of New Orleans, and there were several people making speeches, and in the remarks of Mr. Zachary he congratulated the people of Alexandria in getting the branch there and thought New Orleans would see its way clear to have Mr. Edenborn build his road to New Orleans.

By Mr. GILMORE: Mr. Zachary didn't have any authority——

By Mr. MILLING: I have been taking testimony on the
251 sentiment of this railroad and that is all that this thing amounts to.

By Mr. MILLING:

Q. Mr. Edenborn, just state whether or not Mr. Zachary invited your road to come to New Orleans?

A. Mr. Zachary invited me to build it to New Orleans and told me that the people down here were very anxious to get railroad facilities.

Q. What did he say about giving you facilities?

A. He said that any railroad would be treated with facilities; I afterwards investigated the City of New Orleans with a view of building here. I spoke to many people; I spoke to Mr. Pearl Wight and Mr. Eshleman and several other people, and they were all anxious that I should build my railroad into this City, and they all assured me that the treatment by the City of New Orleans would be liberal to all railroads that would build here.

Q. After these assurances what did you do Mr. Edenborn?

A. I went on building in the direction of New Orleans. I had at that time traffic arrangements with the Southern Pacific from Alexandria, but I built on to Baton Rouge.

Q. Well, after you came and investigated, state whether or not you began to make arrangements to acquire property here and so forth?

A. I then engaged Mr. Saxton—I investigated the City and looked around whether it was feasible to get a railroad as nearly to the business center as possible. I selected a location and afterwards got an agent to come here and buy property for me.

Q. You got your ordinances before the City Council didn't you?

252 A. I did; I had an ordinance prepared and we at that time changed the name; the dates I guess some of my younger men remember better than I, but we changed the name from the Shreveport & Red River Valley to the Louisiana Railway & Navigation Company.

Q. You were originally known as the Shreveport & Red River Valley?

A. Yes sir.

Q. And you changed the name to the Louisiana Railway & Navigation Company?

A. Yes sir.

By Mr. GILMORE: I submit your Honor the charter is the best evidence of the name of the corporation and the gentleman had better produce the charter; I object.

By the COURT: You can go on with the understanding that you will produce a copy of the charter.

By Mr. MILLING:

Q. Mr. Edenborn state whether or not your road is frequently spoken of as the Shreveport & Red River Valley at this time?

A. Yes, it is; a good many people along the line call it that now.

Q. You said that you employed an agent, Mr. Saxton, to acquire property here?

A. Yes sir.

Q. State whether or not you acquired any property on the river front?

A. I did.

Q. State in what manner that property was acquired?

253 By Mr. GILMORE: I object; I would like to see the title; that is the best evidence.

By Mr. MILLING: We propose to show the Court that what is known as Willow Grove landing was owned by some corporation and Mr. Edenborn secured all of the stock of that corporation.

By Mr. GILMORE: I submit, your Honor, that my objection is properly made.

By the COURT: It is only a collateral inquiry; let the objection go to the effect.

By Mr. GILMORE: We reserve a bill of exceptions.

By Mr. MILLING:

Q. Mr. Edenborn state whether or not you acquired the stock of the Pittsburg & Southern Coal Company?

A. I found that the largest piece I could get was a piece owned by a Pittsburg concern, called the Pittsburg & Southern Coal Company, and I sent a man to Pittsburg to buy up the stock of that company and I finally succeeded in buying up all of the stock and it is in my box.

Q. Very well. Now, after acquiring these properties——

By Mr. GILMORE: I ask to see the stock.

By the WITNESS: I'll produce it to-morrow.

By Mr. GILMORE: Very well; please do.

By Mr. RANDOLPH:

Q. I understood you to say, Mr. Edenborn that this road commenced to be built from Shreveport?

A. Yes sir.

Q. At that time the name was the Shreveport & Red River valley?

A. Yes sir.

Q. At that time it was not contemplated to bring it to
254 New Orleans at all?

A. The first idea was to build to Natchez.

Q. You were the principal stockholder of the Shreveport & Red River Valley?

A. Yes sir.

Q. And you controlled that road yourself?

A. Yes sir.

Q. And as it progressed South you conceived the idea of seeking an outlet for export and more expanded business?

A. Yes sir.

Q. That was the idea in your mind?

A. Yes sir.

Q. And then it was that you amended your charter and called it the Louisiana Railway & Navigation Company and largely increased the capital stock?

A. Yes sir.

Q. And that contemplated steamship business as well as railway business did it not?

A. Yes sir, it did.

Q. Then you had not made up your mind as to the objective point even of that railroad?

A. I first decided to build to Natchez.

Q. Well, but wasn't it designated at some point on the Mississippi River near the Gulf?

A. Yes sir.

Q. You had not settled down on entering New Orleans at all at that time?

A. No sir, not at that time.

Q. When these representations were made to you by the citizens of New Orleans you looked into the advantages of coming down here, didn't you?

255 A. Yes sir.

Q. What was the main consideration in your mind in entering New Orleans with reference to handling large quantities of freight and making your railroad a successful line not only in a domestic way but in a foreign export line?

A. To reach deep water.

Q. Where were you seeking ultimately to reach it after the advantages about New Orleans were made to you?

A. On the river front of course.

Q. At that time were *were* you contemplating even after you had considered favorably entering New Orleans, had you settled down on the question of building your own line or making arrangements to come in over another line?

A. I was contemplating using the Yazoo & Mississippi Valley tracks.

Q. What induced you to spend money to build your own rails in the City of New Orleans?

A. Well, a whole lot of citizens here asked me would I build if the franchise was granted, would I enter the City over my own rails.

Q. The franchise you refer to is ordinance No. 1997 New Council Series?

A. Yes sir.

Q. That was under discussion at the time although not presented yet to the City Council?

A. Yes, it was under discussion with representative people.

Q. Did the representative bodies make any overtures to you upon that ordinance, I mean the representative commercial bodies?

256 By Mr. GILMORE: Was it in writing?

By Mr. RANDOLPH: Just the general proposition for a railroad company.

By Mr. RANDOLPH:

Q. Now, Mr. Edenborn, at that time was the press alive to the situation?

By Mr. GILMORE: I make the same objection as heretofore.

By Mr. RANDOLPH:

Q. Did you read the newspapers at that time of the City of New Orleans?

A. Yes sir.

Q. What were their tone in reference to the advent of your railroad into the City of New Orleans?

A. Oh, they all favored it very much.

Q. Were you influenced in any way Mr. Edenborn by the press in your advent to the City of New Orleans?

A. Yes sir, surely so.

Q. You were going to say that representations were made to you asking what you would do as to coming into New Orleans on your own rails if this ordinance was passed; is that right?

A. Yes sir.

Q. Was that one of the things that induced you to build your own road into New Orleans?

A. Yes sir.

Q. What did it cost you to build your road from Baton Rouge to New Orleans on your own rails?

A. Without having the absolute figures before me it was about three million dollars.

Q. I am speaking of the cost of the line from Baton Rouge to New Orleans; I am not talking about the terminals yet, haven't
257 you got a memorandum in your pocket you can refer to?

By the COURT: He means simply the line from Baton Rouge to New Orleans?

A. The cost of the line from Baton Rouge to New Orleans is \$1,685,000.00.

Q. Did you invest in terminals in the City of New Orleans?

A. I did, heavily.

Q. To what extent have you invested in terminals in the City of New Orleans?

A. In the City itself to the extent of \$882,538.00—and with the connection of what you call the city belt reservation \$232,480.00.

Q. For what was that expense?

A. Well, I was to get the river front and the city belt reservation to get to my property.

Q. What was that expense that you read out there of \$232,480.00?

A. For the Belt connection and the Pittsburg & Southern property.

Q. Is that the landing on the river known as Willow Grove?

A. Yes sir.

By the COURT:

Q. To get your Belt connection and for the Pittsburg landing you paid \$232,480.00?

A. Yes sir, \$232,480.00.

Q. Those \$232,480.00 were for running from your main line to the connection with the Belt and for the Pittsburg landing?

A. Yes sir.

258 Q. Can you divide that and give us how much for the landing and how much for the track?

A. I'll do so by to-morrow.

By Mr. RANDOLPH:

Q. What was the total output that you made for building your line from Baton Rouge to New Orleans, and for terminals in the City of New Orleans?

A. A little over three million of dollars.

Q. Would any of that have been necessary if you had come over the rails of the Yazoo & Mississippi Valley Railroad Company and used their terminals?

A. No sir.

Q. Why were these outlays made?

A. In order to get to the river front.

Q. If this ordinance would be lived up to?

A. Yes sir, I look upon it as a contract.

Q. You are familiar with the Frisco ordinance and this ordinance, are you not?

A. Yes sir.

Q. If the Frisco ordinance fell through or rather the Frisco failed to do the work as provided by the ordinance these expenditures were made by you in the building of the line from Baton Rouge South and also terminal facilities acquired with a view of turning them over to your railroad?

A. Yes sir.

Q. Have you been able to make any effective use of these terminals or that part of them which you wish to use?

A. On the river front?

Q. Yes.

A. I have not.

Q. What have you got on the river front besides this Willow Grove property?

259 A. Nothing.

Q. What is the size of this property?

A. A little over two thousand feet river front and it extends four or five blocks to Tchoupitoulas Street.

Q. What opportunities does it offer for the establishment of grain elevators and lumber yards?

A. It offers excellent facilities.

Q. Did you get control of it for that purpose?

A. Yes sir, exclusively for that purpose.

Q. Why haven't you proceeded to utilize it as such?

A. Because the City would not allow me to carry out the contract, the ordinance No. 1997.

Q. What was it your purpose to erect and provide there?

A. The purpose of that property,—the property is divided by Leake Avenue, by the Illinois Central and the Belt Railroad tracks, and on that side towards the river I propose to have the wharves

and docks and especially a good size lumber dock, and on the other side I proposed to have grain elevators.

Q. But you have not been able to provide any such facilities?

A. No sir.

Q. The location of such facilities there how would they compare with the Stuyvesant docks?

A. It would be about on the same footing but not quite as extensive.

Q. On the principle that your road would be the same as the Stuyvesant docks relate to the Illinois Central?

A. Yes sir.

Q. On those docks how does the expense of handling freight where the railroad owns the dock compare to the use of public docks?

260 A. You can get appliances very economically handled and operate much cheaper?

Q. In what respect is it an advantage for you to carry out your original plans if you can get your right under this ordinance superior to the present plan?

A. It would be very superior.

Q. Do you consider that if you could perfect your plans there that it would increase the tonnage on your roads?

A. Yes sir, materially.

Q. Would it enable you to haul car loads of grain to this Port?

A. Yes sir.

Q. How would it affect your ability to largely increase the tonnage over your road?

A. It would enable us to get much more.

Q. Would that be restricted to your own road?

A. No sir, it would go over all of the large roads.

Q. Are you able to extend any such inducements under the present crippled situation of your road?

A. I have not the proper inducements to offer them.

Q. To what extent has your investment with respect to those other terminals been? Has it been a dead investment in the City of New Orleans? You bought other terminals besides Willow Grove landing, didn't you?

A. Yes, I've got City terminals.

By the COURT: Where are they Mr. Edenborn?

A. On the New Basin, and on Liberty Street.

By Mr. RANDOLPH:

Q. Under your ordinance you were required to expend the necessary amount of money for filling what is known as the Poydras ditch; was that done by your road?

261 A. Yes, I had to do it under the ordinance.

Q. Did you comply with that provision of the ordinance?

A. Yes sir.

Q. I see an item here on this memorandum of expenses \$44,-
266.14, for that purpose?

A. Yes sir.

Q. Did you expend that amount of money for that purpose?

A. Yes sir, and even will have to expend more.

Q. I see on this memorandum that you have deposited \$52,195.00 of bonds; what does that refer to?

A. That was a contractual obligation that I should do so, as a guarantee that I should perform my part of the contract.

Q. You did make that deposit then?

A. Yes sir.

Q. Have they still got it?

A. Yes sir.

Q. Was that the one that was offered in evidence here by the City of New Orleans?

A. Yes sir.

Q. On these large outlays of money amounting to \$3,359,905.00 have you received any returns?

A. I have not.

Q. What about the operating expenses over this line that you built as a separate line under the inducement that you have mentioned? Has that paid its own way?

A. No sir.

Q. What deficiency is there?

A. \$1,600,000.00.

By the COURT: You mean that the operating of it has cost you \$1,600,000.00?

A. The loss from it.

262 By Mr. RANDOLPH:

Q. You mean that the operating expenses of the road have fallen short of the earning expenses?

A. Yes sir.

By Mr. GILMORE: How long ago is that? Since when?

A. Since the beginning in 1898.

By Mr. RANDOLPH:

Q. It was a little *steeper* of a road about forty miles long wasn't it?

A. Yes, forty five miles long at the beginning, but they didn't fall short.

Q. When did the serious deficit begin to develop?

A. I guess about 1903.

Q. That was about the time that you built this section into New Orleans and put out those three million dollars?

By Mr. GILMORE: I would like to see the books of the Company in that connection to show that loss.

By Mr. RANDOLPH: This is all collateral.

By Mr. GILMORE: If you withdraw the question I withdraw my request.

By Mr. MILLING: The books are all in Shreveport.

By Mr. GILMORE: If you are going to prove any losses I am entitled to see the books; and I object to the evidence unless I be allowed to see the books.

By the COURT: In the first place the books are out of the jurisdiction of this Court; and in the second place the books of a railroad company would fill two or three rooms like this.

By Mr. GILMORE: Is it possible that there are no records in the City of New Orleans showing the revenues and expenses of this Company since 1903?

By Mr. MILLING: I think we have monthly statements.

By the COURT: Have you any official statements or books of any sort down here by which these matters can be verified Mr. Edenborn?

A. I get statements some times from up there from the Auditor; I will look through them and bring them down here.

By Mr. RANDOLPH:

Q. Mr. Edenborn, when the Frisco under its ordinance failed to carry out its contract, to which your ordinance refers as succeeding to the rights at the time you were stopped by the injunction, were you proceeding to build this section of the Belt road from Audubon Park south to Henderson Street?

A. Yes sir.

Q. When your force was stopped by the police authorities and by injunction?

A. Yes sir.

Q. You heard some of the testimony and on that part of the testimony we propose to make a notation here in the examination of our witnesses, and we offer it by way of response to the testimony already brought out by the plaintiff over our objection; but not waiving our objection to that testimony brought in here on this subject of the practical operation of this Belt railroad system in connection with the Louisiana Railway & Navigation Company's movement over it, under ordinance 1997. Mr. Edenborn you have been connected with the Railway business for some years I believe?

A. Ten years.

264 Q. Have you overlooked every department of the Railway business?

A. I attempted to.

Q. Its construction?

A. Yes sir.

Q. Its operation?

A. Yes sir.

Q. Its financing?

A. Yes sir.

Q. Its office work?

A. To some extent.

Q. You heard some testimony here about the difficulty or practical difficulties which the Belt Commission contends would follow your road operating with its own equipment under their direction over this part of the Belt line from the protection levee down to Henderson Street?

A. Yes sir.

Q. What have you to say as to the actuality of any such difficulties?

A. With the entire control and management under the Belt Railroad authorities there would be absolutely no difficulty.

Q. They do switching under a demurrage arrangement for you now, don't they?

A. Yes sir.

Q. Under this demurrage arrangement?

A. Yes sir.

Q. And they assume to take your cars over that belt to where you want them?

A. Yes sir.

Q. Now, under your ordinance here if instead of delivering them the cars you delivered them the cars and engines and the men to operate both cars and engines, and the movement of that
265 train be entirely under their jurisdiction as long as it was on the Belt how could there be any confusion in the operation of their business on that Belt?

A. No more than with their own, absolutely the same thing.

Q. There is a difference in one respect, that is, it cost you two dollars a car, that is the present arrangement isn't it?

A. Yes sir, that is the difference.

By Mr. GILMORE: And in the other case you pay nothing; is that the inference?

(No answer.)

By Mr. RANDOLPH:

Q. Mr. Edenborn, I wish to ask you on this question of these terminal charges, two dollars a car for hauling each car that you give them down to your dock, or your landing place or to any other point on the Belt that you wanted to be hauled to, that is their charge now, their policy and practice?

A. Yes sir.

Q. Is not that a tax upon the commerce and the produce that you haul?

A. I so consider it.

Q. What effect does the existence of that tax which is independent and in addition to the price that you charge under your tariff for bringing it to the border of New Orleans, what effect does that tax have in alienating business from your road or bringing it to this Port?

A. It has the effect of making me lose, and if I put it on the tariff of the other man he loses, and therefore it is against the interests of my road and against the commerce of the City.

266 Q. Somebody has to bear the burden?

A. Yes sir.

Q. In addition to that, other charges—if goods are brought here for export and delivered by your road in its own docks or in its own grain elevators or lumber yards, what is the difference between that arrangement and the present arrangement of the terminal charges at the docks and in the public ports of New Orleans?

A. Grain, cotton, lumber and such bulky articles that should move in big quantities—if we bring a train load of compressed cotton from Shreveport a distance of 306 miles to the protection levee, that train crew that brought it from Angola to protection levee will have, under the present arrangement, to put in on the interchange tracks that exist between our Company and the Belt and move their engine and quit; and it will have to remain there until such a time of day or night that it might suit the Belt road to get it off; on the other hand if we were allowed to reach our terminals the same crew that brought that train over could — just as easily as switching it on the delivery tracks, which are very seldom sufficient, and you heard Mr. Porch say that they haven't got enough room yet—that crew would have to switch them on a number of those tracks and a lot of time would be lost.

Q. After it got on your docks and the shoving of the stuff on your cars into the ship, how would that economize it as you practice it or as at the Stuyvesant docks? I am speaking of the expense when you get near the water's edge on your own premises? Is that a better and more economical arrangement than to patronize the so-called arrangement down on the public wharves?

267 Don't you have expenses to go down there? Don't it cost you a certain charge attached to the transfer *into* the ship's side?

A. A number of workmen in one place can do better even if you have to distribute these men here and there and you get no results.

Q. I ask you whether as a general proposition the cost would be less in the handling if you carried your trains or cars to the ship's side on your own docks?

A. It would cost less.

Q. Independent of the question of switching?

A. Yes sir.

Q. I'll ask you to state upon your observation whether you know the operation on the tracks of what are called terminal tracks, and what are called yard and switching facilities where those facilities are occupied by three and four different systems of railroads and whether or not confusion results, such as the Belt Railroad authorities feel will result here?

A. I know quite a number of such places.

Q. Where are they?

A. One is the City of St. Louis, where probably a dozen railroads use one line.

Q. Is there any trouble there on that account?

A. No sir.

Q. Do you know of a situation of that kind in the City of Shreveport?

A. Yes sir, but I am not as well acquainted with Shreveport as I am with St. Louis.

268 Q. Do you know the situation there by which the Queen & Crescent, the M. K. & T., and the Houston, East & West Texas and the Kansas Southern and the Louisiana Railway & Navi-

gation Company occupy day and night several miles of tracks, using the same tracks?

A. That exists in Shreveport, yes sir.

Q. Is there any confusion or destruction or injury to the public service there on that account?

A. I never noticed any or never heard of any.

NOTE.—The further hearing of testimony in this cause was continued to Friday, April 26th, 1909, at 1 o'clock P. M.

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FRIDAY, March 26th, 1908.

This cause came on this day for further testimony; Present: The Hon. John St. Paul, Judge, and all parties in interest represented by Counsel.

William Edenborn.

(Testimony Resumed.)

By Mr. RANDOLPH: I believe a call was made upon you for the production of this stock of the Pittsburg and Southern Coal Company; have you got it Mr. Edenborn?

A. Yes sir.

Q. This property is known as the Willow Grove landing?

A. Yes sir.

Q. Shown on this little map?

A. Yes sir.

Q. Have you got that map with you?

A. Mr. Milling has it. And I also have a duplicate.

By Mr. GILMORE: Have you the title of the Pittsburg and Southern Coal Company to this property?

By Mr. RANDOLPH: Is that the location on this little map?

A. Yes sir.

By Mr. GILMORE: I object to any testimony going to show title to this real estate at Octavia Street, except the title deeds. It appears that Mr. Edenborn is the holder of a certain number of shares of stock in the Pittsburg & Southern Coal Company, and as owner of that stock claims to be the owner of this property, and if they desire to prove ownership of the property they must do it

270 by the deed, which is the best evidence.

By the COURT: That would not involve any serious difficulty.

By Mr. RANDOLPH: We will produce the title.

By Mr. MILLING: We have the tax deeds (receipt).

By Mr. GILMORE: I don't want the tax receipts but I want the title deeds.

By Mr. MILLING: We will get the title deed for you Mr. Gilmore.

By Mr. RANDOLPH: We offer in evidence this map to show the physical location of this property.

Q. Are you in possession of this property Mr. Edenborn?

A. Yes sir.

Q. Having taxes on it and in undisputed possession of it since your purchase?

A. Yes sir.

Q. You own all of the stock of the Pittsburg and Southern Coal Company, do you?

A. Yes sir.

By Mr. MILLING:

Q. Mr. Edenborn, who is J. H. Price?

A. J. H. Price is a friend of mine.

Q. I present you a document Mr. Edenborn marked B 7, and ask you to state whether or not that is the agreement entered into between Mr. Price as your agent or agent of your railroad company with the Pittsburg & Southern Coal Company for the purpose of acquisition of this property?

By Mr. GILMORE: I do not think this document is admissible in evidence; it is an offer of sale by a Committee of the Pittsburg & Southern Coal Company to Mr. J. H. Price for the sale
271 of this Willow Grove landing property on certain terms and conditions. I hold that that cannot be binding upon us, and I object to the introduction of this document for the reasons stated.

By the COURT: The objection goes to the effect and not to the admissibility of the document.

By Mr. GILMORE: We reserve a bill of exceptions.

By Mr. MILLING: You can answer the question Mr. Edenborn?

A. Yes sir, it was done on my account.

Q. Mr. Price was acting as your agent at the time?

A. Yes sir.

Q. Please examine documents B8 and B9, and state whether or not the money receipted for was not your money that was paid on account of the agreement and the acquisition of the stock?

By Mr. GILMORE: I object on the ground that this does not show any agreement to transfer the property to the Louisiana Railway & Navigation Company or that it shows any receipt of any price on said sale, but simply shows \$45,000.00 and \$5,000.00, given to J. H. Price, as payments on an agreement entered into between the Pittsburg and Southern Coal Company with Mr. J. H. Price.

By the COURT: The objection goes to the effect.

By Mr. GILMORE: We reserve a bill of exceptions.

By Mr. MILLING: Answer the question?

A. Yes sir, these are the receipts; August 4th, 1902 for \$5,000.00, October 4th, 1902 for \$45,000.00—

By Mr. MILLING: We offer in evidence the three docu-
272 ments identified by the witness, document B7 being the agreement of August 4th, 1902; document B8 being receipt for \$5,000.00 dated August 4th, 1902; and document B9, dated October 4th, 1902; being the receipt for \$45,000.00—In this same connection we offer in evidence the Charter of the Pittsburg &

Southern Coal Co., with the right to withdraw it, or if you will just look at it and admit it has been incorporated. It is marked B10.

By Mr. GILMORE: Is that the certificate of incorporation.

By Mr. MILLING: I suppose that is all they get up there in Pennsylvania.

By Mr. GILMORE: I object to the introduction of this document—

By Mr. MILLING: Strike it out.

By Mr. MILLING:

Q. Mr. Edenborn, instead of actually taking the title to this property, as called for in this agreement, what did you do? Did you take up the stock of the Pittsburg & Southern Coal Company?

A. Yes sir.

Q. Or did you actually take title to the property itself?

A. I understood from my attorneys that I took title by buying the stock.

Q. And you put that stock in the name of the officers of your railroad company?

A. Yes, just enough—I hold 999 in my own name.

Q. And the other is held by dummies?

A. By people in the railroad.

273 Q. But the property was purchased for the purpose of terminals?

A. Yes sir.

Q. And instead of taking deeds to the land you bought the stock of the corporation?

A. Yes sir, I bought up the stock.

Q. These receipts show only the payment of fifty thousand dollars as the matter was proposed originally, you paid that much on account, but what was the total cost of the stock that you bought?

A. \$172,500.00 as expressed in that agreement.

Q. Have you paid for it?

A. Yes sir, the stock was delivered to me and I have paid for it.

By the COURT:

Q. When did you buy that stock Mr. Edenborn?

A. On the 22nd of October 1902.

Q. The agreement was made in August 1902 and the stock was delivered to you in October, 1902?

A. Yes sir.

By Mr. MILLING:

Q. Mr. Edenborn, you said on yesterday that the Shreveport & Red River Valley road was transferred to the Louisiana Railway & Navigation Company?

A. Yes sir.

Q. Will you please state the terms upon which it was transferred?

By Mr. RANDOLPH: I supervised all these transactions and I know that the old Company was sold, lock stock and barrel to the
274 Louisiana Railway & Navigation Company, and that Company extended its terminus to New Orleans.

By Mr. GILMORE: This transfer is dated before the ordinance was passed?

A. This transfer of the Red River Valley to the Louisiana Railway & Navigation Company was passed on the 22nd of June, 1903, long before the ordinance was passed.

By Mr. MILLING:

Q. Mr. Edenborn the reason I was asking you about the transfer of the Shreveport & Red River Valley—do you remember when the Capdevielle suit was decided?

A. I remember there was a decision.

Q. You saw it and read it?

A. Yes sir.

Q. Do you remember of having consulted me about the matter at the time?

A. Yes sir, repeatedly.

Q. State whether or not it is a fact that you consulted me with a view of filing an application to the Supreme Court asking the Court to specifically define the rights of certain persons under that ordinance, or the rights of railroads under that ordinance, the Frisco ordinance?

A. Yes sir.

Q. And we did file such an application didn't we?

By Mr. GILMORE: I object on the ground that the record in the Supreme Court is the best evidence of what was done in the case of Capdevielle, Mayor Vs. The New Orleans & San Frisco Railroad Co.

By Mr. MILLING: The object of this evidence is to show that Mr. Edenborn personally had his attorneys to apply to the Supreme Court for the purpose of construing certain portions of this ordinance, and I propose to follow it up by showing that he acted upon the decision of the Supreme Court.

By the COURT: I think that parol evidence that runs side by side with written or record testimony is narrative.

By Mr. GILMORE: We reserve a bill of exceptions.

By Mr. MILLING:

Q. It is a fact that the application was filed?

A. Yes sir.

Q. And it is a fact that the Supreme Court upon a rehearing took cognizance of your application and put a further construction upon the ordinance?

A. Yes sir.

By Mr. GILMORE: Objected to.

By Mr. MILLING:

Q. And after this decision of the Supreme Court was rendered, it was in June, I believe, the City Council then took up your ordinance and considered it after this?

A. Yes sir.

Q. And you urged the passage of your ordinance?

A. Yes sir.

Q. And you accepted your ordinance believing that the construction placed upon the ordinance by the Supreme Court of Louisiana would be adhered to?

A. Yes, I did.

By the COURT: Then I understand that your ordinance was passed after this Capdevielle suit was terminated in the Supreme Court?

A. Yes sir.

276 By Mr. MILLING: The decision was in June, 1903, and the ordinance was passed in September 1903; it was introduced in February or March.

By Mr. MILLING:

Q. Mr. Edenborn, was your ordinance before the City Council at the same time that the Frisco ordinance was?

A. I think the Frisco ordinance was introduced two weeks earlier than mine.

Q. And the Frisco ordinance was litigated and during that time no action was taken on yours?

A. No sir.

Q. At the same time do you remember another suit of the Board of Port Commissioners of the City of New Orleans vs. the San Francisco Railroad Company?

A. Yes sir.

Q. Do you remember a discussion about answering the City through its counsel asserting the validity of that ordinance and asking the court to maintain it? I mean the Frisco ordinance?

By Mr. GILMORE: The same objection is urged.

A. Yes sir.

Q. You also considered this answer at the time when we were passing the ordinance?

A. Yes sir, I had many interviews with you on that.

By the COURT: At this point, was the Port Commissioners' suit decided before or after the passage of your ordinance?

By Mr. MILLING: Yes, sir, it was decided afterwards but we do not rely upon the judgment, but on the answer of the City itself.

By Mr. MILLING:

277 Q. Mr. Edenborn, there has been a great deal of evidence here about the Port Commission and the Belt Commission and the Commerce of New Orleans, and what was beneficial for it and so forth and so on. Now, state what you had in view with reference to the Commerce of New Orleans at the time when you acquired these terminal facilities and agreed to build your railroad into the City of New Orleans. Did you have in view a steamship line or anything of that kind?

A. Yes sir, I did.

Q. State whether or not you were in active negotiations with a steamship company for the purpose of putting a line of steamers

between this port and Great Britain and ports on the Mediterranean Sea with this City?

A. I carried on negotiations with a representative of an English syndicate, Mr. George Wilson, who was introduced to me, and the object was that a steamship line should be run between Mediterranean Ports, Belgium and other ports, in connection with my wharf facilities down here, and they were also to bring emigrants to this country. I had acquired perhaps two hundred thousand acres of timber land, the title of which, I retained only for saw mills and to sell the timber off of it expecting to sell the land to emigrants. I got in addition to that between ten and twenty thousand acres of agricultural lands and I wanted to get emigration started, and this representative of the steamship interests proposed to furnish the steamship line and bring emigrants to me and get a commission from the sale of the lands to such emigrants.

Q. These are timber lands which are good for agricultural purposes?

A. Yes sir.

278 Q. What did you propose to do with the timber that you would cut?

A. That was to be largely exported.

Q. And through what port Mr. Edenborn?

A. New Orleans.

Q. Have you been able to accomplish that purpose?

A. No sir.

Q. Could you accomplish that purpose if you were permitted to go to the river front and establish your terminals, as was contemplated by you and as was contemplated in your ordinance?

A. Yes, I believe I could.

Q. Please examine this document marked B 10, and state whether or not this document is the proposition that you spoke of from a syndicate or person that you named?

By Mr. GILMORE: If your Honor please I submit that all of this evidence is irrelevant. I object. I do not see what some proposition between a steamship agent or syndicate and Mr. Edenborn in which some private party might get a commission for bringing emigrants here has to do with this case.

By the COURT: The objection is overruled.

By Mr. GILMORE: We reserve a bill of exceptions.

A. Yes sir.

By Mr. MILLING: We offer in evidence this document marked B 10 dated Brooklyn, New York, May 20th, 1905, addressed to William Edenborn, 71 Broadway, New York, Passenger and Freight lines New Orleans to Europe. We also offer in evidence a
279 certified copy of the ordinance extending the time limit spoken of on yesterday.

By Mr. GILMORE: I object on the ground that it is not an ordinance extending the time in favor of or for the benefit of this defendant Company, and has absolutely no connection with this defendant company. It is a resolution by Mr. Cucullu, and I object

on the ground that it is res inter alios acta, and is a motion dealing only with ordinance 1615, which is not the defendant company's ordinance and which was adopted prior to the ordinance of the defendant company.

By the COURT: The objection goes to the effect.

By Mr. GILMORE: We reserve a bill of exceptions.

By Mr. MILLING: This document is marked B 2. We also offer in evidence charter of the Defendant Company, marked B 11.

By Mr. RANDOLPH:

Q. Mr. Edenborn, referring to the expenditure that you made to buy the stock of this Willow Grove landing Company your testimony on yesterday showed that you expended a much larger amount than that for terminals. You mean to say that you acquired more terminals than this one?

A. You mean in the City?

Q. Yes sir?

A. Oh yes.

Q. Did you acquire other property?

A. Yes sir.

Q. I notice "cost of Belt connection." What does that refer to?

280 A. In order to come from the main line of the Louisiana Railway & Navigation Company to the river front and connect with the Belt reservation, we had to build on the outside of the City and parallel with the landing on the City front.

Q. Did you build that?

A. Yes sir.

Q. That was to enable you to connect with the beginning of the Public Belt?

A. Yes sir.

Q. And that piece of railroad was constructed by you?

A. Yes sir.

Q. About what time was it constructed?

A. I don't hardly know the dates.

Q. Two or three years ago?

A. Yes sir.

Q. How long before you were enjoined in this case? It was some time before that?

A. Yes sir.

Q. Perhaps two years before that?

A. Yes sir, it was built a considerable time before.

By Mr. RANDOLPH: We offer in evidence this memorandum in connection with the testimony of the witness marked B 12.

By Mr. MILLING: This memorandum don't give the amount of taxes that you paid on the Pittsburg & Southern Coal Co., property does it?

A. No sir, this is without taxes.

By Mr. MILLING: Mr. Gilmore we tender the witness to you for cross examination.

281 Cross-examination by Mr. GILMORE:

Q. What is the total capital stock of the Pittsburg & Southern Coal Company?

A. I think its total capital stock, as originally capitalized, is ten thousand dollars.

Q. What is the total capital stock to-day?

A. Capital and surplus.

Q. No, its capital stock?

A. Ten thousand dollars.

Q. How many shares is that divided into?

A. I think one thousand shares.

Q. Of those one thousand how many do you own personally standing in your name?

A. Personally, I own nine hundred and ninety-six.

Q. You acquired nine hundred and ninety four of those shares when?

A. I acquired the whole of them at the same time.

Q. When did you acquire the certificates as evidence of your title?

A. The date is on there, October 22nd, 1902.

Q. When did you acquire the other two shares that you own? Look at this?

A. Those were acquired at the same time.

Q. The certificate was issued on what date?

A. This was issued afterwards.

Q. There is one here standing in the name of Mrs. Edenborn; I suppose that is hers?

A. Yes sir.

Q. There is one share standing in the name of F. F. Haddicks?

A. Yes sir.

282 Q. This is dated the 7th of August, 1907?

A. Yes sir.

Q. One in the name of Hubert Johnson, dated the 7th of August, 1907?

A. Yes, he is my private Secretary.

Q. One dated the 22nd of October, 1902, in the name of August Mann?

A. Yes.

Q. How long had the Pittsburg & Southern Coal Company owned the Willow Grove landing before your arrangement?

A. Twenty two or twenty three years.

Q. Were you not a Director in that Company?

A. No sir, never.

Q. Were you not an officer of the Pittsburg & Southern Coal Company?

A. No sir, never.

Q. You never had any connection with this Company prior to your acquiring the stock?

A. No sir, never, until I became the owner of the stock.

Q. What was that property being used for when you bought it?

A. For landing purposes.

Q. Was it rented by the Pittsburg & Southern Coal Company to anybody?

A. When I got the property I believe the Monongahela Coal Company had rented it from them, and they continued a little while with me until I gave them notice that I wanted to put wharves there myself.

Q. What is it used for to-day?

A. For nothing.

283 Q. What has become of the coal landing?

A. I don't know.

Q. Then your property is not where the Willow Grove landing is to-day?

A. No sir.

Q. You said that you paid \$172,000.00 for that property?

A. Yes sir, at that time.

Q. How much rent was the Monongahela Coal Company paying to the Pittsburg & Southern Coal Company?

A. For the time they had it it was three hundred dollars a month.

Q. You estimate the cost of that property at \$172,000.00 and your Belt connection at a total of \$232,480.00? What was a balance of that total for over and above the cost of the property?

A. It was expended to reach the property.

Q. Where does your switch connection from your main line going to the upper Parish line leave the main line?

A. I can't tell you the situation.

Q. Isn't it just above the Parish line that your switch track leaves your main line?

A. Yes, a little distance.

Q. What is the distance from the main line to the end of the switch line at the river and protection levee?

A. I suppose it is about a mile.

Q. How much did you pay for that mile of track?

A. Well, it has cost the difference between the coal landing, the price given in this memorandum.

Q. Then you paid \$60,000.00 a mile for railroad?

284 A. There is a Y connected with that where people turn around, and there is some side tracks on it and I don't know what.

Q. How many side tracks are there between the main line and the end of the switch?

A. I think they have got probably three.

Q. How long are they?

A. I would prefer to have the other men who are in daily charge of it say.

Q. Your statement is that your switch track connection with its sidings between the main line of your road and the river point, where it ends at the protection levee cost you \$60,400.00?

A. Yes sir.

Q. I notice you have an item here on your list of expenditures of bonds deposited \$52,195.00. Where are those bonds?

A. With the City fiscal agent.

Q. Do those bonds bear interest?

A. Yes, four per cent.

Q. And you collect the interest?

A. Yes sir.

Q. And haven't you collected that interest ever since the deposit was made?

A. Yes sir.

Q. You can get the bonds to-morrow if you go to the Bank?

A. I don't believe so.

Q. Why can't you?

A. The City won't consent.

Q. There would be no loss on them?

A. Oh yes, at four per cent there is.

Q. You say that you spent \$44,266.14 for filling the
285 Poydras ditch; how long and how wide is the Poydras ditch?

A. The Poydras ditch was an old canal that was probably
a mile long.

Q. And how wide?

A. I can only talk from memory because after it was filled I didn't bear it in mind, but from memory I should judge it was about as wide as this room.

Q. That is about forty feet?

A. Yes sir, and wider in some places.

Q. You paid \$44,266.14 for filling a canal forty feet wide and a
mile long? Did you pay anything for the canal?

A. For the canal?

Q. Yes?

A. I don't want the canal.

Q. It was the City's public property?

A. Yes sir.

Q. And you got the perpetual use of that property for nothing at the cost of filling the ditch up; now isn't that true?

A. I wanted to get my right of way like other railroads.

Q. Now, answer my question Mr. Edenborn; is it not true that you got a piece of public property a mile long and forty feet wide, and that \$44,266.14 is the amount that you gave as the cost of filling the ditch?

A. Well, for perpetual use, is that it?

Q. Yes sir?

A. I don't think this is perpetual.

Q. Don't your grant give you ninety nine years which is equivalent?

A. Yes sir.

286 Q. So, you got a piece of public property a mile long and forty feet wide for \$44,266.14?

A. Yes sir.

Q. What is your river front property worth to-day?

A. I don't think I could get a bid on it.

Q. You said you had two thousand feet front on the river and you paid \$172,000.00 for it and you sit here and say that you cannot get a bid on it to-day?

A. Oh yes, I might.

Q. What is it worth to-day?

A. I can't say.

Q. Is it worth a hundred thousand dollars?

A. It is assessed for a hundred and ninety eight thousand dollars.

Q. And you only paid a hundred and seventy two thousand dollars for it?

A. Yes sir.

Q. All your other City terminals are figured out here at eight hundred and thirty two thousand, five hundred and fifty eight dollars and fifty three cents? You bought all of the property in the rear of the City upon which these terminals stand, did you not?

A. What do you mean by the rear of the City?

Q. Are not your terminals in the rear of the City?

A. Yes sir, from the protection levee down to Liberty Street.

Q. What property do you own at the protection levee?

A. A number of complete blocks and the right of way.

Q. I mean above the protection levee, just above the Parish of Orleans.

287 A. I own the roadway and some more.

Q. What do you own in the rear of the City of New Orleans?

A. Well, from the protection levee, coming into the City of New Orleans, down to the crossing of the New Basin canal and Carrollton Avenue, I own the roadway and probably a thousand city blocks.

Q. You bought those and paid for them?

A. Yes sir.

Q. You still have them?

A. Yes sir.

Q. They are worth something?

A. Yes, I think so.

Q. They are worth as much as you paid for them?

A. That I don't know.

Q. Have you any buildings on them?

A. Not in that section.

Q. Where are your warehouses and depots and other terminals in the rear of the City?

A. Some are on Carrollton Avenue and some between Liberty Street and Claiborne Avenue.

Q. You constructed buildings and other improvements on that property did you not?

A. Yes sir.

Q. They are in active use daily?

A. Yes sir.

Q. Nobody is interfering with you in the exercise of your right of way in the City of New Orleans and the use of your terminals in the rear of the City or above protection levee or on Carrollton Avenue?

288 A. No sir, nowhere except on the river front.

Q. And that is the only place where you claim interference?

A. Yes sir.

Q. You have the franchises—you have everything else that your ordinance calls for?

A. Yes, I think so.

Q. Except that you are not allowed to run your own trains on the river front?

A. Yes sir.

Q. The statement was made here yesterday by you that the cost of your line from Baton Rouge to New Orleans was \$1,685,000.00. Now how much of that was spent for the roadway and other purposes and how much was spent in construction?

A. I wouldn't figure separately; I would have to figure that out.

Q. Is not your roadbed ballasted from New Orleans to Baton Rouge?

A. Yes sir, with Bonnet Carre sand.

Q. What is the character of the grade of your road and construction?

A. I have, the easiest and straightest curvature of any road in the South.

Q. Isn't the reason that you entered the City of New Orleans was that this was the best and easiest way for your road to New Orleans than if you went anywheres else, and didn't you come to New Orleans on account of it being the best seaport?

289 A. Yes, I consider that New Orleans is the best seaport to reach.

Q. Now, you said yesterday that it would be very much cheaper for you to build your private yard terminals at Octavia Street and construct at your own expense a wharf for lumber, to build or undertake to maintain tracks from the parish line down to that wharf and to operate your trains over that track than it would be under the present arrangement with the Belt Railroad at two dollars a car, and your freight would be handled over the Public wharf and that your method was cheaper than the other; that was your statement yesterday; now how do you figure that out?

A. There are various reasons I can mention; for one thing if a train comes from Shreveport over stocked with any cheap commodity and has to come with its own crew and engines, say, 130 miles, and come to the protection levee and has got to switch its cars then to the interchange track and leave them standing there until they notify them that they are ready to haul them, and then that engine crew has to remain out there, and that same engine crew could take the same train, a third and a fraction of a mile further to my own terminals at no additional cost and simply a cost of a small amount of coal and then the train crew could go home in the street cars.

By the COURT:

Q. In connection with that you mean that your train would have to have its roadway to reach that?

A. Yes sir.

290 By Mr. GILMORE: When the Judge stopped the question that I was about to ask you——

By Mr. RANDOLPH: Let him continue with his reasons.

A. There are other reasons. For instance, the Belt railroad authorities have been very emphatic in telling me not under any consideration would they allow my engines to be on the Belt tracks at all; this property that I acquired for terminal purposes on the river being divided by the Illinois Central and the Belt railroad by Leake Avenue, leaving one portion of that property which I intended for wharves and lumber docks on the river side and leaving two and a half blocks of my property on the City side for handling the cars if I could reach that with my own engines I could have that engine wait until it could put the cars on that track and it could be moved and shoved forward, therefore insuring a continuous operation the same thing if I ran over it myself. I could bring the grain cars having the elevators on the city side with the spouts leaning over as is customary, and there my engine could remain and push the cars from time to time as they were being unloaded, in position, and remove the empties. Another feature would be on trains coming from the North towards the City they would have no full train of cars,—they would have some for the City and some for the river front; for the City terminals they could then leave them at my outer yard. I left a space for a yard where the city belt leaves my main line, a switch of three hundred feet by a mile or more long;

now, they can leave those cars for the city detached from
291 those that were to go to the river front if my own engine

had the right to get to my place that engine could go out there and get those cars and bring them to my own terminals. The City Belt cannot take them a mile outside of the parish line and go to my yard outside of the city and take those cars to me. As a further cause I might dilate on that further. Another feature is the delivery of loads and getting back the empties, and this state is a cotton community that we figure on very heavily, and we are undertaking to take cotton from Shreveport down here instead of letting it go to Galveston and Port Arthur, and then it is necessary for the commerce of the city and the customers along our lines that they be served with empty cars. We have not been able to get more than one daily service from the Belt Railroad. Whether we will get more service in future I cannot tell. Probably, but we do know that the business that the Belt does transact in this district, which is an old established district in front of the City, namely, from Stuyvesant docks down, and the extension is towards Chalmette in that direction it is not upwards, and it looks very much like Chalmette. It looked that way to me the first time I came to that part of the country; saw that. If these cars are in our possession, there being so little business in that part we of necessity would be in this position. No sensible train dispatcher not knowing anything on that himself could allow our train to get our cars as quickly as they were empty and bring them out to our connections on the main line, and the first train could hook them on, and we could serve our

292 whole territory more advantageously and with better accommodations than we could otherwise. That which is true of cotton is true of many other commodities in the same manner.

By Mr. GILMORE:

Q. You say it will be very much inconvenient and expensive for you. The first item of inconvenience and expense that you would be required in dealing with the Public Belt to deliver on the interchange your cars for transportation down to Octavia Street, whereas, as you come across with your own cars and locomotives you can run down without any delay. Supposing, however, as your counsel suggested on yesterday that the Belt Road had complete control of the movement of your cars and could use its own time in determining when it could move your train, is it not better that a train of cars without a locomotive should be waiting at the protection levee than a train with an engine attached?

A. No sir, it would not, for the reason that in any double track in this country the main movement leaving out of consideration is North on one and South on the other. Our train coming there, even though the Belt people had also a train on that South bound track, there would not be any more delay than just to follow in the wake of that train.

Q. Do you think you would have the right, under this ordinance to leave your trains down there whenever they arrived, or do you think, as your counsel does that the Belt road has complete control over your trains?

A. Yes, I do think the Belt has complete control over our trains.

293 Q. Then, if the Public Belt has complete control and management of your trains and it happens, as has been suggested, your train has to wait for the Belt road locomotive,—I am speaking about your territory now—

A. If your locomotive gets in that congested district the upper Parish line is from Stuyvesant docks, probably seven miles, it is a long way, and that portion being not built up, there would be plenty of accommodation for us to get over there.

Q. If you were running on the Belt road?

A. If they wouldn't establish rules and regulations whereby that train could be delayed, with the track there perfectly empty, we could arbitrate rules and regulations, they wouldn't let us run over empty tracks.

Q. If, as your counsel suggests, that the Belt road had to have absolute control of all your movement of trains on the Belt road from Henderson Street to the protection levee what difference is there between the Belt road management when it handles their cars without a locomotive and when you handle yours with a locomotive, that is, what is the difference between the movement of your trains with your own locomotive and the movement of your trains with the Belt locomotive?

A. The actual practice would not be different except the price.

Q. How much does it cost you to bring a locomotive from the Parish line down to Octavia Street?

A. I have explained that I would have to have a number of locomotives there.

Q. How much does it cost you to bring one locomotive with one car from the property line to Octavia Street?

294 A. I'll leave this for my men to answer.

Q. Then you don't know whether it is more expensive to haul with your own locomotive or with the Belt locomotive?

A. With my own I expect I can do it for a dollar and a half.

Q. If you build a lumber wharf of two thousand feet, how much will it cost you?

A. I had these figures in mind at one time, but I haven't got them to-day.

Q. If the Port Commission puts up a wharf at your property say of four thousand feet and pays the cost of it itself, how does it harm you if you have the use of it?

A. For the reasons already stated.

Q. State that again; I want to know how far—how you suffer any loss or inconvenience if the dock commission builds in front of your property a lumber wharf for shipping purposes and at its own cost and gives you the use of it?

A. I lose a great deal of money.

Q. How much do you lose and how much do you save?

A. At this stage it would be difficult to put it in dollars and cents, for first of all I would save by operating myself in the cost of getting my own stuff; it would be a great big bulk; I have been fighting all this time for my own property on the wharf, and I'll suffer in not being able to control the movement of my cars. It is well known, and any railroad man will tell you, if my cars get to the Illinois Central or the Louisville & Nashville, they can go to work and take these cars and pay me twenty five cents a day, whereas, in the biggest cotton season that car would be worth a good
295 deal more money to me.

Q. In that connection, is the Belt Railroad acting under the rules of the car service association?

A. Yes, and so is the Illinois Central under the same service, and they have confessed it was impossible for them to give me my equipment back.

Q. Then you would not suffer any more from the Belt road than any other railroad would?

A. I would have control of my own cars.

Q. How would you control your cars any more with your own locomotive than the Belt Railroad?

A. I could move them when I pleased.

Q. What is to prevent you from putting in your yard tracks at Octavia Street and operating your own yard in connection with the Belt road? And laying the necessary switch and yard tracks and switching your cars in and out of that yard to a wharf, the cars being delivered at your yard by the Belt locomotive instead of yours? What is to prevent you from operating with the Belt road?

A. The Belt don't prevent me, but I would not make that contract if I could help it.

Q. You would have to pay something for bringing your cars with the locomotives?

A. Certainly.

Q. Suppose the cars were brought from the Parish line, by the Belt locomotive, what would be the difference then if yours did it?

A. I would have my own.

296 Q. Would you be using all of your switch and yard locomotives to run up and down there to bring cars down?

A. Not all day.

Q. You could not bring any trains down there even with your own locomotives except it was loaded with a full cargo; you could not bring a mixed train down the river front?

A. Why not?

Q. What would be the use of your terminals in the rear of the City? You would not bring a train up at Octavia Street and send the balance back by the rear to the protection levee, would you? If you have a yard laid out connected with your main line, you would send all your local traffic to Poydras Street?

A. Yes, all local.

Q. And you would send all your through stuff to the river?

A. Yes sir.

Q. For export?

A. Yes sir.

Q. What is to prevent you doing that same business if your cars — brought down by the Belt locomotives instead of your own?

A. The difference is that I have to have a locomotive on this side of the Belt where the grain elevators are located to move the cars from time to time, and I have to have a second locomotive on the river side, and both of these locomotives under the Belt idea would stand idle.

Q. Could you not do exactly what the Southern Pacific is doing, — could you not have a switch track with the Belt road operating your own business at your yard, taking the cars to the ship's side, 297 practically the same as the Southern Pacific are doing to-day?

A. I am not as familiar with the Southern Pacific as some who have lived here longer than me.

Q. The only question in this case is that in one case you come down from the parish line to the river with your own locomotives and in the other with the Belt locomotives?

A. No sir.

Q. I mean between the Parish line and Octavia Street; that is the only real difference?

A. No sir.

Q. You think you have the right to control the movement of your own trains with your own locomotives?

A. Not the movement.

Q. Do you concede that the Belt road controls the movement of your trains absolutely?

A. Yes, the ordinance calls for that.

Q. Then, if that be so, I ask you again, is it not a fact that the only difference between the existing arrangement between your Company and the Belt, and the arrangement that you are claiming, is that in one case the cars are moved down by the Belt road loco-

motives and in your case they are moved down by your own locomotives?

A. Yes sir, from Henderson Street.

Q. You say that the Belt road cannot run above the Parish line from the point of connection with your main line to the levee, but it does run part of the way about three hundred feet beyond the protection levee?

A. To accommodate our customers we provided ourselves with space, and the roadway for tracks for interchange purposes.

298 Q. Suppose the Belt road should obtain permission from the authorities of the Parish of Jefferson to operate from the parish line on the river to the main line of the Louisiana Railway & Navigation Company, and take your cars right from that point, would not that difficulty disappear at that place?

A. It would depend on what they would charge extra for that and then I would lose control of my equipment.

Q. But you have conceded that you have no control and that the Belt road had absolute control of the movement of your cars in the Parish of Orleans. Suppose the Belt does obtain permission from the authorities of Jefferson to run their interchange up there, and suppose they extend their interchange and make a switch connection with your line at the present point of junction, would not the last difficulty between the systems disappear?

A. It would not.

Q. Why not?

A. Because I could not control it and I would have to pay extra for that service and my investment would be wiped out that I made up there.

Q. First, there would be a difference in cost—how much does it cost you to come from the junction of your main line over that switch to the river and the protection levee; how much does it cost you to bring a car?

A. Bringing train loads?

Q. How much a car?

A. You mean the difference between bringing one car and a train load of cars?

Q. Tell me first what it costs a car?

299 A. One car may cost two dollars.

Q. To take a car a mile, is that it?

A. I may not understand the question.

Q. How much does it cost to bring one car with your own locomotives from the junction of your main line with the switch that runs to the river and protection levee. How much does it cost you to take that car?

A. I don't know from experience.

Q. As a matter of fact you break all your trains when you have mixed trains?

A. Yes sir.

Q. If you have a local train you don't break it at the junction but it goes at the Poydras yards?

A. Yes sir.

Q. If you have a train that is all for the river you don't break that train?

A. No sir.

Q. Where there is a mixed train, partly local and partly river, you break it?

A. Yes sir.

Q. How many solid trains for export or delivery along the river front come in over your road to-day?

A. We have not been able to get any at all.

Q. Don't you break every train at that junction?

A. We do not.

Q. How many trains is it that you break a day?

A. I think nine tenths are for the City.

Q. That is in the rear at your city terminals?

A. Yes sir.

Q. Then there is only one car out of ten that goes to the river?

300 A. No sir; at present we switch back from the City because we have not got that yard established that I bought the grounds for.

Q. Then, to-day you are actually breaking up your trains in the rear of the City and sending the cars to the river all of the way back up to the protection levee and the river; is that the way you are doing your business to-day?

A. Yes sir.

Q. Suppose you were to establish your yard at the protection levee, wouldn't that be cheaper?

A. Yes, we expect to.

Q. Then, if the Belt railroad handled your trains for export and the yards where you break the trains to Henderson Street, they would be in the same condition, the same as if you handled them under your own control?

A. Yes, except with the empties.

Q. And you do not know what the cost to you will be if you do it?

A. Yes, in train loads I would take it for fifty cents a car.

Q. From where to where?

A. From that connection to my terminal.

Q. You said you didn't know anything about it just now?

A. I didn't know about taking one single car.

Q. If you say you will take it in train loads for fifty cents, figure out how many trains a day, figure out how many trains come there; you said nine tenths come back to the rear and all your trains are broken up in the rear?

A. I say, in the City here.

301 Q. So, in the City yards you say you could bring whole train loads through at fifty cents a car? Now, would you ever bring train loads through there?

A. Just give me a chance and I'll show you.

Q. Say a lumber train; where would you have a full train made up?

A. We have saw mills where we could make up full train loads.

Q. Where would be the last place that you would change the locomotive on your line?

A. Angola.

Q. How far is Angola from the protection levee?

A. One hundred and thirty miles.

Q. If you change a locomotive at the protection levee, how much would it cost you?

A. Forty dollars I believe.

Q. For the train?

A. Yes sir.

By the COURT:

Q. Now, Mr. Edenborn, for instance, if you could not operate your own trains over this Belt Railroad track and could not get these terminals except through the Belt what would you do about it?

A. Like a man with a revolver shoved in front of his head.

Q. Is there any location along that line that you could get there through?

A. I don't know of any, no sir.

Q. You explained about operating a solid train from the protection levee to your landing and expressed the belief that that would not interfere in any way with the operation of the
302 Belt road,—would that be equally true as to handling single cars between your yard and Henderson Street with your own engines?

A. Not in the same nature, perhaps.

Q. For instance,—let's say one car load of lumber to be delivered at the same wharf down by, say, the Leyland line for instance,—would what you say about not interfering with the Belt apply also to that?

A. Trains move South on one track and North on the other: you see they establish rules by which all trains move and they have a dispatcher which gives each train his time.

Q. And you claim that under this ordinance you have the right below your landing to take each individual car and move it from place to place along there?

A. Yes sir, and the Dock Board's needs is below Toledano Street.

Q. Would handling these individual cars prove advantageous to you instead of leaving them for the Belt Railroad? Does that prove advantageous to you?

A. Judge I have been trying to tell the City authorities and the negotiations which were carried on came to that point when Mr. Gilmore drew up a document in the Mayor's parlor stating that if the Louisiana Railway & Navigation Company would relinquish its rights to the City Belt Railroad reservation then we will give our assistance to get tracks for the Louisiana Railway & Navigation Company to their Marine Hospital yard.

Q. I am asking you whether or not it would be advantageous to you to be able to handle single cars say along that stretch between
your landing and Henderson Street?

303 A. It would, yes sir.

Q. To place a car here and one there?

A. Yes sir.

Q. And you are claiming that right under these regulations?

A. Yes sir.

Q. Then, if you observe a great deal of this testimony has been taken in connection with that part of the line above your landing, principally about that part?

A. Yes sir.

Q. And your counsel in asking for the cost of this Belt road has asked for it separately, first, the cost of the upper line of Audubon Park to Toledano Street and then the cost from Toledano Street down to Henderson Street; what is the reason of this division? Does the ordinance make any such division?

By Mr. RANDOLPH: Yes, the ordinance makes a division.

By the COURT:

Q. Another thing I want to ask you Mr. Edenborn, is, if it was so important to you to get over this Belt Railroad how came you to accept this grant only in case the Frisco Railroad did not take it?

NOTE.—Argument by counsel.

By the COURT:

Q. Over what particular line would you get in your landing if you could get in there?

A. I want to get in on both sides.

By Mr. RANDOLPH:

Q. This memorandum of expenses or outlay of monies that you testified to that you made in the City of New Orleans was upon the theory that you would enjoy the benefits of this ordinance?

304 A. It was.

Q. The details of these figures were given to you by your sub-officials, were they not?

A. Yes, the Auditor.

Q. But you know that you have paid the bills already?

A. Yes sir.

Q. But as to exactly what each separate piece cost you you do not carry in your memory?

A. No sir, I could not.

Q. In that connection it appears that the sum total that you paid for this landing wharf, the extent of which you testified to, was one hundred and seventy odd thousand dollars?

A. Yes sir.

Q. That is without taxes and interest paid since?

A. Yes sir.

Q. Since you bought it the assessment has gone up enormously?

A. When I bought it it was assessed for twenty nine thousand and five hundred or eight hundred dollars. Yesterday we found it assessed at a hundred and ninety eight thousand dollars.

Q. In that item of something over two hundred thousand dollars it specifies the connection between your main line and the upper end of the Belt railroad track, and that means the outlay of money that you spent to build that connection?

A. Yes sir.

Q. The difference there of sixty odd thousand dollars is what you laid out for the purpose of roadway and the erection of Y's and sidetracks?

305 A. Yes, main tracks and side tracks.

Q. To make this connection?

A. Yes sir.

Q. Your main idea I suppose is to get your own wharf, is it?

A. Yes sir.

Q. When you get there and have your own warehouses and grain elevators you have a free wharf, haven't you? Isn't that your theory?

A. Yes sir, that is the idea.

Q. Is or is not that an asset of incalculable value to a railroad?

A. I so consider it indeed.

Q. Can you figure that out in dollars and cents accurately as to how much it is worth to you?

A. That would be difficult to do.

Q. That being the case, if you could advertise the fact and convince the commercial world of the fact that you could send through trains or practically through trains from your main line to the side of the ship, what would be the consequence in a financial way to the proprietors of your road?

A. It would increase the business wonderfully.

Q. Is the difference of running this train in with your own car and engine and letting the belt commission run them with their own crew and charging you two dollars a car, is that the only difference between you?

A. No sir, it is not.

Q. Isn't that an infinitesimal difference?

A. Yes.

306 Q. In the commercial aspects of the L. R. & N.'s future and your properties in connection therewith, is it not affected by all these other considerations as well as the difference of two dollars charged per car?

A. It is affected by the two dollar charge by the inability to handle its equipment and by the wharf charges.

Q. Now, in the development of the question of wharves, can you under your plans afford to wait upon the movements of the Port Commission or anybody else?

A. It would simply be a continuation of loss.

Q. In the meantime what becomes of the capital, that is the money that was current and put in dirt?

A. I fear that the loss that I gave yesterday will be continued.

Q. There is no free wharf there that you know of except yours?

A. I know of no place where I could get as large a river front as this.

Q. You heard a proposition stated here of the proposed plans of the Port Commission to extend the wharves up there? Can you wait upon them until they do that?

A. No sir.

Q. Is it or not important for you to send your products into a wharf that is easily reached and where there is very little congestion instead of trying to get into the wharves in the center of the City?

A. The other elevators would not handle my freight when they had their own; that would be one of the very great objections, to go anywheres else.

Q. And if you perfect your plans would you or not avoid all of the charges of the Port Commission of the City of New Orleans in your export business?

A. Yes.

Q. Is or not that an important item in the development of the Louisiana Railway & Navigation Company?

A. Yes, it is.

Q. You said in the practical operation of sending your train from the connection between your line and the Belt Railroad that with reasonable regulations that your trains when they are brought there could be carried under the directions of the Belt authorities in blocks of cars down to your landing?

A. Yes sir.

Q. Mr. Gilmore in his inquiry laid stress upon the point that you would be under the authority of the Belt Commission—and that you would be powerless; did you proceed upon the theory that the rules and regulations would be reasonable and business like; do you?

A. Yes, indeed I do.

Q. Do you know of any condition where there would be no difficulty in moving your trains promptly as they arrived there?

A. I see no difficulty at all.

Q. On that section of the road there is no congestion at all?

A. No sir.

Q. You have your crew on the train already when it arrives there?

A. Yes sir.

Q. And your engine and engineer and conductor?

A. Yes sir.

308 Q. Is there any economy from a business standpoint in dislodging all of the members of that crew and putting new men by the Belt Railroad Commission on the trains, or is it better economy to let them stay there to be used by the Belt Commission themselves?

A. It would be the best economy to let a train go through to the wharf.

Q. Is it not a principle of commerce as it is in physics, that the continuity should not be broken if you want to force your power of the movement?

A. Yes sir.

Q. Can you at this time, in the early dawn of your business estimate what would be the difference in dollars and cents of your being permitted to carry out your rights under this ordinance or under the policy insisted by the Public Belt. Can you measure it in dollars and cents at this time?

A. You cannot at the beginning of the enterprise.

Q. Is it or not a great difference to you one of the principle?

A. Yes, the great principle of business.

Q. Isn't that the fundamental proposition that you stand on?

A. Yes sir.

Q. As to how far the difference in dollars and cents in the future development of this business will be it is impossible to say at this time?

A. Yes sir.

Q. But the demand in this case, to proceed under the ordinance is based on a business principle?

A. Yes sir.

309 Q. Where various railroad trains and equipments operate over the same tracks, from your observation have you ever noticed any confusion or collision resulting from that management?

A. No sir, I have not.

Q. Is it or not the practice all over the United States?

A. It is practiced very extensively; quite a number of roads use the same track and the same terminals without any confusion.

Q. In larger communities than New Orleans?

A. Yes sir.

Q. Where the movements are greater?

A. Yes, sir; very much greater.

Q. From actual experiment or experience do you know in dollars and cents what the actual cost is to move a freight car a mile or five miles?

A. It is exceedingly rare when only one car is moved.

Q. Have you ever made any test of that kind?

A. No, I have never made a test of one single car.

Q. Up to the present time have you handled any through trains of grain?

A. No sir, not one.

Q. Why not?

A. We cannot give them the service of facilities at this port.

Q. You mean in New Orleans?

A. Yes sir, we cannot give them the facilities in this port.

Q. Have you handled through trains of lumber?

A. No sir, not exclusively through trains.

310 Q. Why not?

A. Because we are handicapped.

Q. In what way?

A. Handicapped by making deliveries.

By Mr. MILLING:

Q. What roads run into Shreveport that run through the grain countries that can connect with your road?

A. Principally the L., K. & T. and the K. C. S., and we expect before the end of this year to also have a connection with the Santa Fe.

By Mr. GILMORE:

Q. How much grain shipments have you declined?

A. We have declined some; I don't know how much.

Q. How much?

A. I am not in charge of that part, only occasionally.

Q. You don't know?

A. No sir.

Q. How much lumber have you declined?

A. We have not been able to give them the rate.

Q. Has anybody made any tender to you of either grain or lumber to you that you have declined?

A. The parties in charge of that branch can tell you as to the lumber; I cannot.

Q. How much did you pay to switch a car to wharves below Henderson Street before you made this working arrangement with the Public Belt?

A. We have had to pay exceedingly heavy charges.

Q. Now, you only pay two dollars per car; how much did you pay before?

A. I suppose we paid, two, three, four and five dollars; I don't know exactly.

311 Q. Haven't you paid at times as much as seven and nine dollars to switch cars from your main line and from your City yards to points on the river front below Henderson Street?

A. Well, I am not advised that we have, but possibly.

Q. How much did you pay for switching stuff taken to and from the Louisiana Sugar Refinery; how much per car?

A. For switching or drayage?

Q. For either?

A. I believe for switching the rate was four dollars, but we had to cover several railroads.

Q. All of that switching is now done for you at two dollars per car?

A. Yes sir.

Q. You cannot do the switching under your ordinance below Henderson Street?

A. We would gladly give it to the Public Belt.

Q. You want to repudiate it above and take advantage below Henderson Street?

A. We want our rights.

Q. Is there any other difference between the present arrangement and the arrangement you claim unless that if your grant is confirmed you have a better property to sell or mortgage in the shape of the franchises. Is that the truth of it? I mean as a selling proposition?

A. I went into this enterprise—

Q. Now answer my question. I don't want you to sit there and say no for your own benefit; isn't that true?

A. Yes, but I have never intended to sell my road; that is my baby; and I propose to build that thing up myself and keep it and not sell it.

Continued to Wednesday, March 31st, 1909.

312 CLARENCE ELERBE, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. MILLING:

Q. Mr. Elerbe, what is your connection with the Louisiana Railway & Navigation Company?

A. Assistant to the President and Treasurer of the Company.

Q. How long have you been connected with this road or the road that it succeeded the Shreveport & Red River Valley Railroad?

A. Since the incorporation of both companies.

Q. What years?

A. For the Shreveport & Red River Valley 1897, and for the Louisiana Railway & Navigation Company in 1903.

Q. The road was then first known as the Shreveport & Red River Valley Railroad Company?

A. Yes sir.

Q. Mr. Elerbe, were you connected with the proposition to get the road into the City of New Orleans?

A. Yes sir, I was actively in charge of it in connection with Mr. McIlbrid, who was our General Manager, and I was not in it for my good health when the matter was finally brought to a conclusion.

Q. When you came to the City of New Orleans for the purpose of assisting in getting up an ordinance and locating the railroad what was the temper and feeling of the citizenship of the City of New Orleans with reference to the admission of your railroad into the City of New Orleans?

A. The commercial bodies of New Orleans gave us every encouragement to build the road into the City of New Orleans as
313 they already had some trade along the proposed line, and they wanted to get all of the trade in South Arkansas and Louisiana that they could, and they formally invited us here by resolution—

By Mr. GILMORE: I call for the resolutions.

By Mr. MILLING: Does your Honor hold that we have to produce a resolution of that kind?

By Mr. GILMORE: I call for the best evidence and that is in the shape of the resolutions.

By the COURT: Do you intend to prove anything more than the general fact and not the terms?

By Mr. MILLING: No sir, that is all.

By the COURT: The objection is over-ruled.

By Mr. GILMORE: Counsel for the City of New Orleans reserves a bill of exceptions.

By Mr. MILLING:

Q. When you came to the City of New Orleans and began to whip your ordinance into shape, state Mr. Elerbe what was done by the commercial exchanges of the City of New Orleans with reference to the same?

A. Our ordinance was introduced into the City Council of the City of New Orleans in the Spring of 1903. In February after we

had decided after we would look into it and what we would like to get, the Frisco so-called ordinance No. 1615 New Council Series was before the City Council for consideration. At that time there was some conflict between the two ordinances on account of the Belt Railroad provision of both ordinances, the river front portion of the Belt, the so-called Frisco ordinance was finally passed
 314 over the veto of Mayor Capdevielle, and the City Attorney, acting as attorney for the Mayor filed a suit to annul the ordinance. The Supreme Court of the State upheld that ordinance in general terms. We intervened in the Supreme Court through our attorneys and asked them to clarify that judgment on the point of the operation of the Public Belt Railroad—

By Mr. GILMORE: I submit that the record in the Supreme Court is the best evidence of what was done by the parties.

By Mr. MILLING: They are before the Court.

By Mr. GILMORE: Have you offered the entire record?

By Mr. MILLING: We have.

By Mr. GILMORE: I don't remember it.

By Mr. MILLING: It is a fact I have offered it in evidence.

By the COURT: Do you offer it now?

By Mr. MILLING: We offer in evidence the judgment of the Supreme Court, the petition, answer and judgment and the application for a rehearing and the judgment thereon in the case of Paul Capdevielle Mayor, vs. City of New Orleans et als.

By Mr. GILMORE: And in this connection we offer in evidence the entire record in the case of Paul Capdevielle, Mayor vs. New Orleans & San Francisco Railroad Co., No. — of the Supreme Court and the entire record in the case of the Board of Port Commissioners vs. New Orleans & San Francisco Railroad Company.

By Mr. MILLING: You can answer the question Mr. Elerbe.

A. The Supreme Court rendered an amended decision and put the ordinance in such a shape that our attorneys advised us
 315 that we could operate over the Public Belt, that the City would give us the right, and we proceeded with our ordinance before the City Council and had it referred to the Board of Trade, the Progressive Union, the Cotton Exchange, the Sugar Exchange and the Stock Exchange, and myself and our counsel and Mr. Saxton our General Agent here, and Mr. Gilbert our General Manager conferred about ten different times at night with the Board of Trade and several other times with the other exchanges. We went over the ordinance line by line with the authorized committees from those exchanges—

By Mr. GILMORE: I ask that the resolutions be produced your Honor?

By the COURT: I think you should produce the resolutions Mr. Milling.

By Mr. MILLING: We reserve a bill of exceptions.

By Mr. MILLING:

Q. Mr. Elerbe, was there any opposition to this ordinance on the part of any of the exchanges?

A. No sir.

Q. Then after these conferences with the various exchanges and no opposition being expressed by them, state whether or not you went before the City Council?

A. Yes sir, before the Streets & Landings Committee and the Streets & Landings Committee unanimously recommended the passage of the ordinance and the City Council passed it.

Q. When you appeared before the Council, state whether or not there were any Committees from the various exchanges who also appeared before the Council in behalf of the ordinance?

316 By Mr. GILMORE: I submit your Honor that the official proceedings are the best evidence.

By the COURT: The objection is over-ruled.

By Mr. GILMORE: I reserve a bill of exceptions.

By Mr. MILLING:

Q. Answer the question?

A. They were there.

Q. What committees were there?

A. From the Board of Trade; Mr. Shreiber and Mr. Lafaya; from the Cotton Exchange Mr. Sol Wexler; from the Progressive Union Mr. Ross and several other gentlemen whose names I do not remember at this time.

By Mr. GILMORE: He should prove whether these gentlemen styled Committees were authorized, and I object.

By the COURT:

Q. They appeared there representing themselves to be Committees of these Exchanges?

A. Yes sir; the public print so stated.

By the COURT: The objection goes to the effect.

By Mr. GILMORE: We reserve a bill of exceptions.

By Mr. MILLING:

Q. You know they were there affecting the ordinance and that they stated that they represented these Exchanges?

A. Yes sir.

Q. During this time state what was the attitude of the press of New Orleans upon the proposed ordinance?

A. It received favorable assistance and encouragement and no unfavorable criticism from any of the newspapers of the City of New Orleans during its passage, and when it was finally
317 passed it had the approval of every newspaper in the City of New Orleans as passed.

By Mr. GILMORE: This evidence goes in subject to my objection.

By Mr. MILLING:

Q. Please take these clippings and refer to one of each of the newspapers published at that time?

A. The Picayune under date of September 1st, 1903, an editorial headed "The Red River Valley Comes In"; It says: "Last night the City Council recognized its duty to the commerce and people of this City by unanimously enacting the ordinance admitting the Louisiana Railway & Navigation Company to track privileges and other franchises in the City. This Company, which represents a real trunk line Railway interest, has for months been seeking admittance to the City and to the river side for its trains and tracks. For a time, and almost up to the last moment, the most inveterate opposition was made to it in the interest of another company that already enjoys extraordinary free benefits from the City. But the various commercial exchanges of New Orleans, recognizing the supreme importance of opening every proper avenue for the commerce of the City, after carefully scrutinizing the request of the Railway and Steamship Company, joined in recommending and urging it upon the City Council. The matter was finally discussed in Committee on Monday night, and was reported to the full body of the Council with unanimous approbation.

Tuesday night the matter came up in the Council, and it was unanimously adopted, showing that the Council recognized the potentiality of the popular demand for the admission of the road, as well as the enormous importance of adding this new avenue of commerce to the business facilities of this City and Port."

By MR. MILLING: Take some other one; that will do for that.

A. The Times Democrat under date of August 24th, 1903, in a long editorial headed "The Louisiana Railway & Navigation Company Ordinance" says:

"The ordinance granting the Louisiana Railway & Navigation Company (formerly the Red River Valley Road) entrance to New Orleans, the right of way into the City and other privileges, comes up before the Streets & Landings Committee of the Council tonight. The ordinance, as originally introduced, has been carefully considered and investigated by a Joint Committee of the commercial Exchanges, which has suggested several changes and amendments. These have been accepted by the Company, and the ordinance goes before the Committee approved and endorsed by all of the commercial bodies except the Sugar Exchange, and that it lacks only because that Exchange held no meeting after the amendments were agreed on at which action could be taken on the ordinance as a whole.

This approval of the Exchanges is a gratifying evidence of the progress New Orleans has made of recent years, and the friendly attitude it has assumed towards railroads desiring to enter the City for the purpose of doing business here. There was a time, not so very many years ago, when a railroad proposition of this kind would have been received with suspicion if not with actual hostility and even recently railroads asking privileges, notably the Illinois Central and the Frisco, have encountered opposition among the merchants. The attitude therefore assumed towards the Louisiana Railroad & Navigation Company evidences a more friendly and a more liberal railroad policy that promises much for New Orleans.

The new road comes to us with strong endorsement from the commercial bodies at Shreveport and other towns through which it passes. There can be no question of its advantage to New Orleans. It will not only preserve to this City the trade of a section latterly drifting to St. Louis and elsewhere, but that it will open new territory to our merchants. The Times-Democrat welcomed the new line here when its purpose to build to New Orleans was first announced.

Relative to the ordinance now before the Committee, there has been so far less difficulty and less obstruction than former railroad ordinances have encountered. New Orleans, recognizing that it is destined to become one of the greatest railroad centers in the country, is perfectly willing to give new lines entrance to the City and such other facilities as are necessary for handling their business. There is very little difficulty about the right of way asked by the Louisiana Railway & Navigation Company.

The only objection raised was to a short stretch in Julia Street, and this, we understand, has been arranged with the Board of Control of the New Canal. But the Belt question has, as usual, proved a somewhat difficult one to settle satisfactorily, and it is to this part of the ordinance that the joint committee of the commercial exchanges has given the most attention, aiming to prepare a plan that will be fair and just to the City and to the railroads already here. In the grant to the Frisco of the right of way into New Orleans that road agreed to build a public belt from its present terminus (the upper side of Audubon Park) to Clouet Street; and it was provided that any other line using that Belt should pay into the City Treasury the amount its construction cost the Frisco, the money to be devoted exclusively to the extension and completion of our Belt system.

To the Frisco ordinance, therefore, the Council is fixed, but the new road does not wish to use all this belt, or rather it does not wish to decide the matter just now, and it asks for the use of the track only as far as Henderson Street, for which it offers to pay \$50,000.00 now and \$25,000.00 later, making a total of \$75,000.00.

As it accepts all the conditions, rules and regulations of the City in regard to the use of the Public Belt, the only question that can arise is whether the amount it offers is adequate compensation for the privilege it asks. It would not be fair to the

Frisco to let another road enjoy the privilege of its track for less than it pays. What is the value of that privilege, that is what will be the cost of this track. The Louisiana Railway & Navigation Company says it can be laid for \$75,000.00, and evidently believes so, for it has offered to do the work if the Frisco declines.

The joint Committee of the commercial exchanges seems to entertain the same idea, for it has accepted the estimate and approved the ordinance. The matter, however, remains in the hands of the Committee and Council for decision. If there is any doubt as to the cost of this road there ought to be little difficulty in determining it by consulting railroad builders and engineers. There are no engineering difficulties in the way, and as the price of rails, ties, labor, etc., is fixed, the Committee should be able to settle the question in a few hours. It is to be hoped that it will not permit or encourage delay. New Orleans has suffered too much already from these de-

lays in the settlement of railroad problems, and the sooner they are settled the sooner we will enjoy the trade the new lines will bring us. As the value of the Belt privilege has been fixed at the cost of the construction of the Belt or the portion of it used, it is simply a matter of determining what that cost is. Is the estimate of the Louisiana Railway & Navigation Company and the commercial exchanges a fair one? If so, it seems to us the offer of the railroad company should be accepted."

322 By Mr. MILLING:

Q. Have you got one from the Item and States?

A. Yes, sir, the Item of August 18th; the Item editorially urges Committee of Council to approve franchise. It says:

"The proposed ordinance in behalf of the Louisiana Railway & Navigation Company, who seek entrance to the City for the Red River Valley road, comes up to night before the Committee of the Council with the amendments which have been suggested by our commercial bodies. The Item asks for this measure the approval of the Committee. We must encourage every highway that promises to add to our business, even at some present sacrifices, in full confidence that liberal action will in the end redound to the prosperity of all" * * *

By Mr. MILLING:

Q. That is sufficient; have you one from the States?

A. I don't find one from the States; there were so many of them from the States; it was in favor of the ordinance all the way through.

Q. Mr. Elerbe, see what the paper said about the ordinance after it was passed, the Mayor signing it, or anything?

A. The Picayune, under date of September 3rd, 1903. The heading is: "Exchanges Ask Mayor to Sign, But the City Attorney Has Not Seen The Ordinance Granting The Red River Valley Entrance To the City. He Sends It To That Official For Examination, Before Deciding As to His Own Course In The Important Matter."

323 "Yesterday, Mr. Lafaye, President, and Members Shreiber and Kohnke, of the Board of Trade, called on Mayor Capdevielle and requested, as a Committee representing the institution, that he affix his official signature to the ordinance granting rights of way and other privileges to the Louisiana Railway & Navigation Company, passed by the Council at its session on Tuesday last. The gentlemen said that the Board of Trade had given the measure the fullest consideration, going over each and every provision contained in it with representatives of the several commercial bodies of the City and making amendments where it was thought it advisable so to do. In all of the discussions the interests of the City had been carefully looked after and safeguarded. They considered the ordinance in its present shape as perfect as it could be made, and trusted that the Mayor, after a careful going over it, would approve it with his signature. In its present shape, they said, it had received the endorsements of all the exchanges, who appreciated the necessity for giving the new company the facilities required for its entry into the City and conduct of its business.

Mayor Capdevielle, after listening to all the gentlemen had to say, asked if they had given full consideration to the provisions in the ordinance giving the Company joint control of the Public Belt with the Frisco road, and if they were satisfied that this was a legal and proper provision. Mr. Shreiber said that this feature of the ordinance had been given the fullest thought and study, and that
 324 the best advice obtainable had been sought and secured. The opinions and advice of such eminent attorneys as Col. J. D. Hill, Eugene Saunders and Jared Sanders had been invited, and they declared positively that it was within the province of the Council to give joint management of the Belt to the Louisiana and Frisco roads, consequently the Board of Trade and the other exchanges asked that that provision be kept in the ordinance. The Mayor said he hoped the Board of Trade was right in this matter and hoped that the City was able to give the joint management of the Public Belt not only to the two present companies but to twenty companies. The Mayor then said he would go over the ordinance carefully and act as the law directed that he should. * * *

By Mr. MILLING:

Q. You have a clipping of an interview with Mayor Capdevielle in which he was giving his reasons?

A. Yes, he wanted the advice of the City Attorney and he referred it to the City Attorney.

By Mr. RANDOLPH: Did he sign it?

A. Yes sir.

Q. The opinion of the City Attorney is on it?

A. Yes sir.

Q. The same gentlemen who is trying this suit now?

A. Yes sir.

By Mr. GILMORE: That was nothing more for him to do than to advise the Mayor to sign it as a mere ministerial act.

Q. What does that say?

A. "Yesterday morning Mayor Capdevielle, having the
 325 opinion of City Attorney Gilmore concerning the right of the Council to give joint control of the Public Belt between the Frisco and the Louisiana roads, in which the legal adviser of the City advised that the City had the authority to sign the ordinance.

Shortly after he had signed it Jared Y. Sanders, Attorney for the Louisiana Railway & Navigation Company called on the Mayor to ascertain what disposition had been made of the measure. When the Mayor told him he had signed it, Mr. Sanders asked his Honor where was the pen that had been used in making the signature.

"Here it is," said the Mayor, handing over an ordinary pen holder and pen.

"Well, Mr. Mayor" said Mr. Sanders, "if it is agreeable to you, I would like to confiscate this pen. This is my first railroad ordinance, Mr. Capdevielle, and I am rather proud of the signal conquest made in obtaining from the administration the right of way

and other privileges, without any antagonisms, conflicts or even arguments of a serious nature. I want to remember this day, Mr. Mayor, and come back to the people of the City one day and show them the giant arm of the Louisiana Railway bringing the tons of freights into the City and lifting the exports out, and say that your administration did a very creditable thing for the City when it made the way of entry of the Louisiana Railway & Navigation Company into the City of New Orleans."

Mr. Sanders then took the penholder and pen, and, wrapping them carefully in a sheet of official paper, placed them in his inner coat pocket, and assured the Mayor that this souvenir would be mighty comforting to him to look upon in other days." * * *

By Mr. GILMORE: Have you the City Attorney's opinion.

By Mr. MILLING: Yes, right here and I'm going to offer it in evidence.

By Mr. GILMORE: Read it.

By Mr. MILLING: It is too long.

NOTE.—Witness reads the opinion of the City Attorney from copy of the Times Democrat of September 4th 1903.

Admission: It is admitted that this is a true copy of the opinion.

By Mr. GILMORE:

Q. In this connection all of these newspaper clippings that you have been reading were published and the ordinance was passed before the decision of the Supreme Court in the Port Commission case?

A. Yes sir.

Q. And immediately after the Frisco case?

A. Yes sir.

Q. And before the Port Commission case was decided?

A. Yes sir, the Port Commission case was then up before the Courts.

By the COURT: Is there any evidence in this record showing where the trunk of this Belt Railroad runs, whether on the wharves or on the street?

By Mr. GILMORE: The map shows it. It don't run on the wharves; it runs on the open space immediately behind the wharves.

Q. All these sidings are on the wharves?

By the WITNESS: Yes, on the river side, and some sidings are not on the wharves.

327 By Mr. MILLING:

Q. What effect did these various actions of the commercial bodies and the decision of the Supreme Court, the opinion of the City Attorney and the answer of the City of New Orleans in the case of the Port Commission vs. the Frisco have upon your road with reference to accepting this ordinance?

A. I was Secretary of our Company at that time, and our Presi-

dent and Directors looked upon the ordinance granting us franchises in the City of New Orleans as bomb proof, and we proceeded as fast as our financial and physical means would let us to build our line into the City of New Orleans from Baton Rouge, something that we had only previously decided to do and something that we refused to do in the ordinance, and we were solicited repeatedly "if you will only put in there that you are coming over your own rails you can get anything" and my answer was that we could not do such unless we spent a great deal of money, and we finally decided to build our railroad into the City of New Orleans.

Q. Then it was upon the faith of the validity of this ordinance that you built the road from Baton Rouge to New Orleans?

A. Yes, sir, legal and commercial faith; a railroad getting a square deal from the public they generally think that they will continue to get a square deal and that has a great deal to do with its policy and operation.

Q. After you got the ordinance passed, you went forward with your line to New Orleans, as rapidly as possible. State what particular track you built to connect with the Public Belt track?

328 A. We built a track from about three quarters of a mile above the City limits down to the protection levee at the end of the Public Belt tracks, about that.

Q. What did you build that track for?

A. To connect with our Public Belt tracks.

Q. What was contemplated with reference to a yard at that point in connection with running your road to your river terminals?

A. We purchased and paid for the ground to lay our tracks at the point where our main line and the City Belt connection, as we call it, diverged.

Q. What was the object of having a yard at that particular point?

A. So that in case a train came in with mixed City and export freight City stuff could be broken up at this yard and sometimes we run through City and export trains.

Q. What was to become of the City stuff and the export stuff?

A. We would take it to our proposed yards down at Octavia Street and also to the City yards between Claiborne and Liberty Streets in the City.

Q. Your yards at Octavia Street you mean the yards that you proposed to build at what is known in this record as Willow Grove landing?

A. Yes sir.

Q. The property that Mr. Edenborn testified that he acquired for the purpose of river terminals?

A. Yes sir, which our company purchased?

Q. Did you build those yards?

A. No sir.

Q. And why not?

329 A. Because when we started to carry out our ordinance the City first arrested us and finally enjoined us.

Q. And brought this suit?

A. Yes sir. We then had our line nearly finished to New Orleans.

Q. Had it not been for the fact that you had this right of way over the Public Belt, would you have built the three quarter- of a mile track at the upper limits of the City and bought this yard property?

A. No sir, I can't answer *answer* that exactly.

Q. It was bought in order to get over the Belt to your river terminals was it not?

A. Yes sir.

Q. Mr. Elerbe, there has been a question raised here as to why this suit pended so long after it was filed. Now state the reasons if you know why this case was not tried sooner?

A. The Company didn't believe in going into Court in a matter of this kind; we did our best to compromise this suit by repeated conferences before and after the suit was brought, personally and by correspondence; our attorneys had some and I had some with the City Attorney myself; that is, these compromises—I mean conferences, and we could not compromise; we had to do something at the river front or absolutely quit.

Q. When was the last conference, do you remember?

A. The Progressive Union appointed a Committee composed of Mr. Walker and Mr. McWilliams to see us, and they asked us to see if we could not straighten it out; I can give you a copy of the President's report; anyway they took it up with us, and we
330 finally wanted to compromise it and that led to the conference.

By Mr. RANDOLPH:

Q. You mean the temporary arrangement evidenced by this written memoranda?

A. Yes sir.

By Mr. MILLING:

Q. I believe that the memoranda itself says: all efforts to compromise failed?

A. Yes sir.

Q. And this agreement was to handle your cars until this suit was decided?

A. Yes sir.

By Mr. GILMORE: As the witness has stated that as there had been some attempt to compromise between the filing of the suit and last year I call for the correspondence.

A. There was correspondence before the suit was filed.

By Mr. GILMORE: There was correspondence before the suit was filed and then there was correspondence and conferences?

By the COURT:

Q. What efforts, I don't mean the details or the number of attempts, or the circumstances, but what efforts were made to compromise this suit?

A. I can testify of my knowledge that I called on Mr. Gilmore once with a view of compromising the suit, and our attorneys reported to me in person that they saw him two or three times.

By Mr. GILMORE: When was that?

A. Early in the Spring of 1907.

331 By the COURT: That was about six or eight months after the filing of this suit?

A. No sir, that was about a year and a half after this suit was filed.

Q. That would be in the Spring of 1908?

A. Yes sir.

By Mr. RANDOLPH:

Q. This you know personally: you are not prepared to speak of other efforts other than that?

A. Except that Mr. Godechaux reported to us that he had made efforts to compromise the suit.

By Mr. GILMORE: That was also in the Spring of 1908?

A. He can remember the dates better than I can.

By Mr. RANDOLPH:

Q. Do you remember when the Public Belt authorities finished this road from the upper line of Audubon Park down to Toledano and Henderson Streets?

A. Some time in the late summer of 1908.

Q. You have been testifying as to the inducements which influenced your Company to build its own road into the City of New Orleans and to acquire terminals; did the Company arrange to acquire large terminals in the City of New Orleans?

A. Yes sir.

Q. On the City front as well as in the rear?

A. Yes sir.

Q. For what purpose mainly on the City front?

A. For the purpose of elevators and wharves in order to handle the business to the ships for export.

Q. You heard the charter of the Louisiana Railway & Navigation Company read here the other day, didn't you?

A. Yes sir.

332 Q. It proposed to operate steamships as well as railroads?

A. Yes sir.

Q. Was that not the policy of the railroad at the time when you concluded to enlarge the Shreveport & Red River Valley Road?

A. Yes sir.

Q. You say that you have been the Treasurer of the defendant Company all these years?

A. Yes sir.

Q. Did you hear the statement testified to by Mr. Edenborn as to the amount of monies which have been expended by the Company in building its own line into the City of New Orleans and the acquisition of terminals in the City of New Orleans.

A. Yes sir.

Q. Are you familiar with these figures?

A. Yes sir.

Q. Are they correct, Mr. Elerbe?

A. Yes, they are taken from our books.

Q. I understand now that part of these expenditures was for work called for by your ordinance as a condition precedent to having the right of way, such as filling the Poydras ditch?

A. Yes sir.

Q. And the rights of way for this track that you built from the main stem of your line towards the river to connect with your belt line was quite an expense?

A. Yes sir, the roadway was very expensive, and a portion of it is through a low place, not exactly a swamp, and the water remains on it sometimes six weeks at a time, and we have to cross the Yazoo & Mississippi Valley three times and the Illinois Central one.

Q. In favoring these moves the policy of the Company in looking to the making of it into a carrier for not only domestic but for foreign purposes connecting with steamship lines, was that — policy which you had earnestly and seriously in view at the time?

A. Yes sir; the object of our Company was this. We connect at Shreveport, Alexandria and Winfield with several trunk lines which had no port and one or two which had no entries into this port, and we were led to believe it was the policy to build to New Orleans and build up an exporting business, build the proper wharves and yards and handle freight scientifically, economically and perhaps put steamships if they were necessary in commission, and we went so far as we very near froze a contract with a steamship line.

Q. Were all these ventures based on the terms of this ordinance?

A. Yes sir, absolutely keystone.

Q. There has been a great deal of testimony here about the present temporary arrangement which you have with the Public Belt authority. Under this ordinance it appears you were to pay when the Frisco failed to build it the cost of construction to Henderson Street?

A. Yes sir.

Q. That is the fixed cost isn't it?

A. Yes sir.

Q. How does that fixed charge compare in the economy of railroad building and common carrier operations with the present charge of two dollars per car?

A. I would have to answer that in my own way.

Q. Yes, I want you to.

A. The cost of construction of that line has been placed by these gentlemen from the upper limits of Audubon Park down to Henderson Street at about twelve to fifteen thousand dollars a mile. The interest on that investment at six per cent per annum would be about nine hundred dollars per mile, and to properly maintain at a rough guess another thousand dollars a mile, so that would make a cost of maintenance and interest charges if we had to do all of the maintenance to say two thousand dollars a mile, or call it fifteen

thousand dollars a year. We don't have to do all that maintenance under our ordinance because the maintenance is on the basis of number of cars moved over the City stretch by our line and by the City Belt dividing on a pro rata basis that maintenance could be cut at least in half. Now this company ought to move into here not less than one hundred cars loads of export freight per day including all of the stuff we can handle, and for that reason one hundred car loads export stuff a year would be thirty six thousand.

Q. Is there any limit to that?

A. No sir, it is only a guess on my part.

Q. With the advance of business and increase of settlement and development of the country, should not that be continually increased?

A. Yes sir.

Q. Can you estimate at this time what that tax would be on the commerce on the country?

335 A. No sir; I cannot.

Q. All this line of questioning here is in reply to the testimony of a similar character brought in by the plaintiff, against which we objected and subject to our objections?

A. Our business can be handled by a switch engine or switch engines as our business might grow, and there is another very serious question; the Interstate Commerce Commission's rules and the general practice permits a railroad to move a defective car to its own terminals, whereas if you deliver it to another connecting line it might be damaged, and the delay in getting it to a place where you can repair it makes the per diem or car hire increase on that car very rapidly.

Q. What application has that with the present arrangement with the Public Belt authorities?

A. Or we will have to have an inspector to examine each one of these cars of ours before they are delivered to them, and that is only one of many costs. Now, the delay on your export business is something that is beyond the power of a man to estimate. You have to handle your export business in a hurry,—meat for instance we have had to draw it clean across town to get it there; it must be moved.

Q. In what other respects is it an advantage to get into your own private docks, just as the Illinois Central at Stuyvesant docks?

A. The cattle that we deliver to the Public Belt road in addition to two dollars per car has a charge of five or six cents according to the location.

336 Q. How much is that a car?

A. Two and a half to three dollars a car for unloading in addition to the switching at our City yards we unload the same cotton costing seven dollars and fifty cents a bale.

Q. That business assumes large proportions, and this is a big task?

A. Yes sir, and when it comes to grain we can't handle any at all; we have no facilities and none in prospect of being filled.

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By Mr. MILLING:

Q. What roads do you connect with over which grain would be transported for delivery to your line?

A. The M. K. & T.; the Kansas City Southern; Iron Mountain & Cotton Belt.

Q. They connect with your road where?

A. At Shreveport and Alexandria.

By Mr. RANDOLPH:

Q. Then if you carry out your general policy under this ordinance you would soon have your docks and facilities that you describe at your own wharf?

A. Yes sir, and there is lumber that we produce fifteen hundred car loads a month, and our friendly connections in Arkansas and others in Louisiana and Arkansas, the Tremont & Gulf and Kioba; the South Eastern produces three thousand cars per month; that lumber, a large portion of it, now how much I cannot specify, ought to move by export; but there is a charge of two dollars per car by the

Public Belt for switching, a delay in movement, no facilities
337 at the docks, and a charge of not less than five dollars per car for yanking the stuff with their crude methods off of the car and getting it in reach of the ship's tackle, and New Orleans as a lumber port simply is not it. I think we handle sixty cars for the time I looked up.

By Mr. RANDOLPH:

Q. If your policy under your ordinance could be carried out you would soon be in a position on your own docks and landings, at this property on the river side, to carry them out?

A. Yes sir.

Q. And you would in that way reach your original objective which is the water port at New Orleans and place your freight in foreign bottoms?

A. Yes, and move our own bottoms.

Q. Now then, under that arrangement, you would be the manager of your own development instead of waiting now upon the policy of the Public Belt authority and the Port Commission?

A. Yes sir.

Q. In other words if the way was clear you would build your own docks and grain elevators and your own facilities for handling lumber instead of waiting the pleasure of the Belt authorities; is that the proposition?

A. Yes sir, exactly; and in the meantime our rails are wearing out.

Q. It is a difference of having control and not having the control of it?

A. Yes sir; and the business don't move; their own figures show
338 nineteen hundred and some odd cars in that time; that is nothing; We did deliver some to Chalmette and don't know how much, but Mr. Haddicks can tell you how much.

Q. I want to ask you one question about the difficulties which the

Belt authorities put forward in permitting you to avail yourselves of this ordinance by utilizing your own engines and own crew to get your stuff to the objective point instead of using their engines and crew. Would there be any confusion resulting from that arrangement of yours?

A. No sir, that is absolutely simple; that is my opinion.

Q. Have you had observations in that respect where half a dozen different railroad companies, with their own cars move over the same tracks?

A. Yes sir, in the City of St. Louis the Railway Companies all bring their trains, both freight and passengers with their own engines into their own terminals, and even on a large number of the tracks do their own switching with their own engines, and the St. Louis terminal Company does a lot of switching itself; that company is owned by the railroad company and is run by a manager who is elected by the Directors of this terminal company, which is owned by the railroad and which has built up the City of St. Louis more than anything else.

Q. Do they use their own locomotives and their own cars?

A. Yes sir.

Q. Under what authority or rules are these railroads operated over these tracks?

339 A. Under the rules of the St. Louis terminal Company.

Q. Have you been there and observed it?

A. Yes sir.

Q. Has there been any congestion or confusion of commerce at St. Louis owing to the fact that these railroad corporations are permitted to run that way?

A. No, it is considered a great big promoter of St. Louis business.

Q. Would there be any sort of confusion here if that was carried out?

A. No sir, there is no reason why two railroads cannot operate on the same tracks.

Q. Do you know of any instance in Shreveport where more than two, three, four or five railroads use the same yards and switch tracks and so forth?

A. Why, the H. & S. and K. C. S. use the same switching facilities, and have done it down there for years.

Q. There are no tracks in the City of Shreveport converging to this Union Depot which are used in common by your road, the L. R. & N., the K. C. S., the S. S. W., the M. K. & T., the T. & P., and H. & S.?

A. Yes sir.

Q. And the B. S. & P.?

A. Yes sir, side tracks laid to the Union Depot, and they use them. The L. R. & N. and the S. L. S. W. have joint track facilities between Bossier and Shreveport, covering about three miles and a half of track, on which we run freight and passenger trains and switch engines, and handle industries of various kinds. The Vicksburg, Shreveport & Pacific and ourselves used to have some arrangement until the Cotton Belt was built—the same arrangement,

340 and there never was an accident.

Q. Was there any impairment to the public service on account of that arrangement?

A. No sir, it is considered to be a very excellent arrangement for the benefit of the public.

Cross-examination by Mr. GILMORE:

Q. Now, Mr. Elerbe while on that subject, are not the very best facilities for through export railroad and steamship business to be found in Galveston?

A. Not that I know of.

Q. Have you ever visited Galveston?

A. Yes sir.

Q. Don't you know that that is considered the very best arrangement for through traffic?

A. No sir.

Q. How does it compare with the other seaports?

A. I understand that the facilities of Savannah—relative to the exporting of cotton I would be prepared to give you a comparative statement for Savannah this evening.

Q. When were the improvements made in Savannah?

A. I think about four years ago they commenced.

By Mr. GILMORE: In connection with this statement of the witness I want to offer the official report of the Port Investigation Commission appointed by the State of Louisiana to investigate the Port of New Orleans, and for the purpose of making an investigation of the terminal facilities at Savannah, Pensacola, Mobile and Galveston, for the purpose of showing that the Port Commission's report establishes that the best facilities are at Galveston; that
341 report was made in 1908. It is marked O 1.

By Mr. RANDOLPH: Objected as res inter alios acta.

By Mr. GILMORE: It is official.

By Mr. RANDOLPH: That may be, but it is not binding upon either litigant in either case.

By the COURT: The objection is well taken.

By Mr. GILMORE: We reserve a bill of exceptions and annex the report marked O 1 to said bill.

By Mr. GILMORE:

Q. Mr. Ellerbe, when were you last in Galveston?

A. About three years ago.

Q. Is it not a matter of fact that they have piers and Galveston is served by a Belt Railroad?

A. Yes sir.

Q. It is not a fact that a number of trunk lines run into Galveston?

A. Yes sir.

Q. A great many?

A. Quite a number.

Q. As many as run into the City of New Orleans?

A. Yes sir.

Q. Is it not a fact that no trunk line is allowed to send its engine of the Belt tracks of the Galveston Wharf Company?

A. It has been changed.

Q. Is it not a fact that no trunk line is allowed to run its locomotive over the Belt tracks of the Galveston wharf lines?

A. I can't say.

342 Q. Is it not a fact that the Galveston Wharf Company controls every pier with the exception of one pier which is controlled by the Southern Pacific?

A. Yes, but I can't say exactly what business the Southern Pacific do, but they do a wonderful business.

Q. So, the entire wharves of Galveston, with the exception of one important pier and one system is controlled by what is known as the Galveston Wharf Co.?

A. Yes sir.

Q. And all the railroads that run into the City of Galveston reach the water front over the Public Belt Railroad which allows no locomotive to enter on its tracks?

A. All but one system.

Q. And that one system reaches only one pier?

A. Yes sir.

Q. And that is the Southern Pacific?

A. Yes sir, which does more than one half of the business done at Galveston; I will say that the Southern Pacific quit New Orleans and went there.

Q. Is it not a fact that the only difference between the Galveston Wharf and Belt Railroad system and the system in New Orleans of wharves and Belt Railroad is that one is controlled by a private corporation and the other by the public?

A. No sir, that is not the only difference.

Q. What is the other?

A. The other difference is the one that you stated.

Q. What was it?

A. That the Southern Pacific, with whom we compete line
343 by line and point by point have their own facilities in Galveston.

Q. I am simply asking for an answer to my question, and you can put in all these other things at your leisure with your own counsel?

A. The Southern Pacific and the Illinois Central, and the New Orleans Terminal Company, which is owned by the Northeastern and Frisco and the Texas & Pacific all have their own private terminals on the river front. At Galveston the Southern Pacific has private terminals on the river front; at both points there is a so-called public belt system reaching certain public wharves.

Q. How many public wharves does the Public Belt system of Galveston reach?

A. All.

Q. Then the Public Belt and Wharf system at Galveston is really more exclusive than the system at New Orleans?

A. No sir.

Q. You just stated that a number of private railroads have private terminals here and only one at Galveston?

A. Yes sir.

Q. Is the wharf and public belt system at Galveston not much more exclusive than the one at New Orleans?

A. It depends on what business is done at the wharves.

Q. How much cotton was exported from Galveston in 1908 over these wharves controlled by the Galveston wharf Company, and fed by the Belt system?

A. I'll give you that but I cannot do it now.

Q. What do you need with a yard for your railroad?

A. You want to break up your cars and trains and store the cars.

344 Q. Why?

A. Because one reason is you would have ten days.

Q. Then, you must have place to break up your trains and switch your cars?

A. Yes sir.

Q. Every railroad has to have it?

A. Yes sir, sure, and some have three and four yards.

Q. Then when you speak about yards you are speaking of a place where trains are broken up?

A. There are break up yards and storage yards and terminal delivery yards, and there are wharfage yards.

Q. Your yards in the rear of the City, what are they?

A. They are mixed sheds.

Q. What do you use them for?

A. For all purposes; some for delivery and storage.

Q. Could you do your business in the rear of the City if some other railroad was operating in your yard also?

A. Yes, we do it in Shreveport.

Q. Is it better to handle a railroad and switch and use the side tracks than to have every railroad using them?

A. It depends.

Q. Is it better for a trunk line railroad to have its own yards or to run a yard in combination with a lot of other roads?

A. It depends upon the question of costs.

Q. As a matter of convenience it is better for a railroad to have its own yard or is it better to have a yard that it uses in combination with other railroads?

By Mr. RANDOLPH: This is a self evident proposition; the question is whether both could use it without injuring each other.

345 By Mr. GILMORE: I want to know whether it is better or more convenient for a railroad company to have its own yards, or if it was operated in combination with a number of other railroads; and the witness is now on cross examination.

By Mr. RANDOLPH: We want to restrict the inquiry as much as possible.

By the COURT: The objection is over-ruled.

By Mr. GILMORE: Would it be practicable for all of the railroads entering the City of New Orleans to operate in one railroad yard?

A. No sir, you would have to have various yards, and it depends entirely upon the volume and the character of the business.

Q. Mr. Elerbe, have you ever had plans prepared for that proposed lumber wharf at Octavia Street?

A. No sir.

Q. Did you ever go into the possible cost of that proposed lumber wharf that you speak of?

A. Yes sir.

Q. How much do you estimate you would have to spend?

A. I don't remember, but I can get the figures.

Q. How is it that you paid \$60,000.00 for one mile of track?

A. We have a very expensive roadway.

Q. How much did you pay for the right of way?

A. I don't remember.

Q. You only know the figures from the books?

A. Yes sir, as I remember now; but I can state this; they knew that is, the property owners, that we absolutely had to get down here because we were under bond to get our main line to the City
346 Belt road, and of course we paid everything that they asked for the right of way, but I don't know how much.

Q. How much do you estimate that you would have to pay for building double tracks from the upper line of Audubon Park to Henderson Street?

A. I don't remember.

Q. You would have to build those double tracks at your own expense under this ordinance.

A. Yes sir.

Q. You would also have to do this wharf work?

A. Yes sir.

Q. Did you estimate the dimensions of the wharf?

A. No sir, I don't remember.

Q. But you would have to expend the money for the building of the tracks and the wharf and also for putting in spurs and other switches at Octavia Street?

A. Yes sir.

Q. So, before you could operate you would have to undertake a large expense?

A. Yes sir.

Q. Would it be one million dollars?

A. I can't say; for instance, you could contract to build your elevators—

Q. I am not speaking about elevators, but how much would you have to spend?

A. I can't say.

Q. All this was up in the air; you never had any plans?

A. Yes, we had plans, and the Dock Board had their wharves already and the Illinois Central, had already their wharves
347 and it was just a question of so much cost per foot.

Q. Can't you give me an approximate idea?

A. Of how much money it would cost?

Q. Yes?

A. I cannot.

Q. How are you to determine what expense it is going to be to your Company to haul your cars from the upper protection levee to Octavia Street unless you know your own figures?

A. I was figuring on the amount of costs that it would cost us compared with other places where we have facilities of doing the unloading on.

Q. You always figure that you are always entitled to a certain amount of interest on all funds that you spend?

A. Yes sir.

Q. Of course you would figure the rate of interest on transportation from the protection levee to the ship's side?

A. Yes, you could have these things done without any interest, at all; the Dock Board made a proposition that the docks be built by the lumber people who were not to pay any interest at all, and we have had the same kinds of propositions on that lumber wharf; but I cannot tell you without a great deal of figuring how much the cost of the wharf would be.

Q. But you have been testifying very positively that two dollars was a frightful cost?

A. Yes, for switching.

Q. I want to know what you are going to charge the people?

A. Oh, you are speaking about switching.

348 Q. No sir, I am talking about the wharves?

A. Switching is governed by our ordinance, and under our ordinance we are not allowed to charge anything.

Q. What is it going to cost you?

A. From and off our line down to this Public Belt, we are not allowed to charge anything.

Q. Under the public wharf and Public Belt system you pay nothing but two dollars a car for the switching?

A. We pay more than that.

Q. You pay more to the Public Belt Railroad than two dollars per car?

A. Yes sir.

Q. What do you pay for transporting your cars?

A. Two dollars a car.

Q. If there was a public wharf there what would you as a railroad company pay for switching?

A. We don't pay anything, but the ship does; the traffic stands the charge.

Q. I know that the traffic stands the charge just as you do the total cost; the total cost to you under the Public Belt system and the wharf system as a railroad is two dollars a car for the switching.

A. No sir, that is not the total charge under the wharf and belt system, no sir. You are wrong there, because the public wharf and Public Belt system compels us to get that car of lumber down there on the public wharves, and when you do that you have to

figure the cost of your transporting it over the Belt road and the cost of unloading.

Q. Who does the unloading; who employs the people to do it?

349 A. The steamships.

Q. As a matter of fact to-day does not the Louisiana Railway & Navigation Company employ the men who unload the cars and pay this charge of five dollars that you are talking about?

A. No, it is unloaded by the other people; we pay the steamship people.

Q. Does the Public Belt road pay them?

A. No sir.

Q. So, then, the only charge that you have to pay the Public Belt is two dollars per car?

A. Yes sir, but you asked me about the wharf system and the Belt Railroad also.

Q. Yes, I did, and I'll keep on asking you. The only charge against you in the working arrangement is two dollars per car?

A. Yes sir.

Q. You say that you have to pay an additional charge of about five dollars a car for unloading?

A. Yes sir.

Q. Does the Public Belt railroad have anything to do with that?

A. Well, yes; I'll tell you why; my information is that the cost of handling at the private docks, both here and at other ports, where the control of the cars is in us, the placing of the car the time that you get your labor to your car, your gangs for unloading it, makes the cost about two and a half to three dollars a car; therefore the Belt is responsible for a part of that cost. Our costs for unloading cotton at our own docks, which I can give you the price
350 (it takes in the proposition that we have control of the cars and handle them) at a cost so our agent told me of one and a half cents per bale against five cents on the river front.

Q. Why do you pay more on the river front?

A. Because it is beyond our control.

Q. Don't you employ the people?

A. No.

Q. Do the steamship people—are they not the agents, practically?

A. Now, that's a big question.

Q. What is the cost of unloading a car at Stuyvesant docks?

A. I can't say.

Q. What is the cost of unloading a car at the Southern Pacific wharf?

A. It has been two dollars and a half and up.

Q. Is it not a fact that the Belt road has nothing to do with the unloading of a car?

A. No sir; I think it has a great deal to do with it, not inferentially, not indirectly, but absolutely direct and straight connection; the time you get your stuff to the place and the amount of it you get there at one time, to do the physical rough labor has a great deal to do with it.

Q. Then you think that the Public Belt would be better administered if these delays and extra costs would be avoided?

A. I am not familiar enough with it to say.

Q. What authority has the Public Belt road over your business except to switch your cars and charge two dollars, a car for service? Has it any control or jurisdiction over the unloading?

A. It has control over the time of delivery and time of unloading.

Q. And your theory of the ordinance is that it would always have it?

A. Yes sir.

Q. Who unloads the lumber that comes in over the Public Belt road?

A. I don't know, we have had so little.

Q. The only charge that you pay under the present system is two dollars a car for switching; you pay nothing for constructing the tracks?

A. Yes, that is all we pay now.

Q. You pay nothing for maintaining tracks?

A. No sir.

Q. If a wharf is built by the public you pay nothing for that?

A. No sir.

Q. The ship pays the tonnage and the regular wharf due fees?

A. But the through rate is based on the cost of getting it to the ship plus the ship's rate.

Q. Would not the through rate if you built your tracks and wharves and hauled your own cars be so adjusted as to give you a fair return on your investment?

A. Yes, I presume so.

Q. How much would that make the cost of hauling a car?

A. You want to ask me the question in a roundabout way. It would depend entirely upon the conditions. We are not in shape to compete with people who have built their private wharves and who handle lumber for the same distance we do, because they have the wharves and move the stuff in there and not having the actual figures I can get the general result. We have no wharves and the others have, and they get the lumber while we have no facilities.

Q. As a matter of fact you are not in a position to tell me what per cent of investment it would be necessary for you to cover in your through rate?

A. It would depend entirely upon conditions.

Q. And you are not in a position to tell me?

A. No sir.

Q. How much do you pay for an engine a day?

A. Twenty five dollars per day we figure.

Q. How much would it cost you to run an engine from the upper line to Henderson Street?

A. I can't say, but an engineer can tell you.

Q. You say that you want this yard at the protection levee to break up your trains?

A. Yes sir.

Q. Would there be any difference if they went behind the Belt locomotives?

A. Yes sir, there would be a big difference, two and threefold in our favor if we have a yard at the junction; I mean the junction between our main line and our Belt road branch.

Q. Is that the location?

A. Yes, of one of our yards.

353 Q. That is yard No. 2?

A. When we do a proper exporting business we would do like other exporting railroads, bring our exports; very frequently and especially in the rice season in train loads as well as in mixed train lots and in the train load lots, that stuff should move direct to our yards at Willow Grove landing.

Q. How could you control that?

A. Common sense would control that. I would not be worried about that.

Q. Is that two fold?

A. The other objection is that if the Belt road——

By the Court:

Q. You mean if the Belt people had full control of your train and the line was clear between the Parish line above and your yard, they would not hold you back for the fun of it?

A. No sir, and if the local switching needed some assistance in the way of tracks we would be there to do it, and then another objection and another cost if the Belt railroad are drawn with bare locomotives the cars would have to be inspected; each car would cause a delay and some of them would always be rejected and would have to be switched out, and the train would have to back up here and there and yank part of them and fix them here and there and the train would take these cars under the Master Car Service Association rules.

Q. Where does that rule come from?

354 A. That is a rule that is in effect between all the railroads that are governed by the Interstate Commerce Commission rules; it is the universal railroad rules and it is based on common sense.

By Mr. GILMORE:

Q. Where would you make up your through trains, the solid trains that you speak of?

A. At Angola we have a break-up yard there, and that is 130 miles from here.

Q. How many of these unmixed trains run into the City of New Orleans now. You are doing a big business now?

A. No sir.

Q. How many solid trains run into the City of New Orleans now per day?

A. I cannot give any idea on that matter because so many of the trains don't come into the City of New Orleans at all. The Texas & Pacific do their export business at Westwego and the Southern Pacific I don't know how they handle their business.

Q. I am speaking about the Louisiana Railway & Navigation Company?

A. Oh not many just now.

Q. In order to make the improvement you would have to make up solid trains at Angola so as to come right through over the Belt road tracks?

A. Yes, that would be the proper method of operating because I am sure we would have so much business.

Q. Did you follow the negotiations had with the Texas & Pacific for the operation by the Public Belt of their locomotives on passenger trains on the river front?

A. Only in front.

355 Q. Don't you know that the proposition was rejected because the Belt Railroad could not conduct other business on account of the schedule?

By Mr. MILLING: We object.

By Mr. GILMORE: I withdraw the question.

By Mr. GILMORE:

Q. Mr. Elerbe, you spoke of certain roads that connect with your line at Shreveport and Alexandria, and you spoke of the importance of them to seaport terminals; were they very much interested in that matter?

A. They were very anxious to get into New Orleans.

Q. Did they speak to you about your entering here and coming to the river front?

A. They spoke of our building our road to export their products.

Q. Then it was very much to their interest to have you succeed naturally?

A. It was very much to our interest.

Q. Let me ask you another question——

A. I can't specify exactly how much to their interest it was.

Q. Let me ask you another question; this wharf that you said you were going to build did you intend it for everybody's else's use except the Louisiana Railway & Navigation Company?

A. No sir.

Q. Do you expect to do all of the lumber business that comes through this City?

A. No sir.

Q. You expect to do a good deal of it?

A. Yes sir.

356 Q. And you expect to use this wharf for your business of lumber and cotton and other merchandise for export?

A. No sir.

Q. You do not?

A. No sir.

Q. Then, what do you expect to use the wharf for?

A. We expect to use the wharf for lumber and cotton and grain specially.

Q. And you say that the City of New Orleans would be benefited by the increased lumber business that you could bring?

A. Yes sir, I think so.

Q. Would it not be better for the City of New Orleans to have a four thousand foot lumber wharf that all of the railroads could use instead of having a lumber, cotton and grain wharf that your company alone could use?

By Mr. MILLING: We object to that portion of the question about other railroads.

By the COURT: The objection is well taken.

Redirect examination by Mr. RANDOLPH:

Q. Mr. Elerbe, there has been some discussion here as to the relative advantage of the railroad itself to be served by the Public Belt authority or to be served by itself, as regards terminal and wharf facilities. Do you know any railroad company that has been and is now enjoying what you are trying to get here?

A. Yes sir.

Q. Do you know any such railroad that the public authorities have attempted to talk over this question with, of handling
357 these terminal matters, generally, do you know of any railroad that has voluntarily come forward to abandon its private rights to wharves and locomotives and turn that feature over to the Public Belt system?

A. No sir.

Q. Do you infer that that situation is valuable property to the railroad enjoying it?

A. Yes sir.

Q. And that is all that you are asking here isn't it?

A. Yes sir.

JOHN ALBION SAXTON, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. MILLING:

Q. Mr. Saxton, you live in the City of New Orleans?

A. Yes sir.

Q. Have you ever been connected with the Shreveport & Red River Valley Railroad Company?

A. Yes sir.

Q. What road was the predecessor of the Shreveport & Red River Valley?

A. The Louisiana Railway & Navigation Company.

Q. The defendants in this case?

A. Yes sir.

Q. Was the Shreveport & Red River Valley the same road as is now owned by the Louisiana Railway & Navigation Co.?

A. Yes sir.

358 Q. In what capacity did you serve the road and how long were you with them?

A. I was General Agent, and with them a little over five years, and about five years, principally acquiring terminals.

Q. Are you the agent who acquired the terminals in the City of New Orleans?

A. Yes sir, and I looked after the ordinance and franchises.

Q. When it was decided to come to New Orleans were you actively interested and engaged in securing the rights of way and franchises?

A. Yes sir, I came here and made special reports for different proposed routes before the final adoption of the terminal plan.

Q. What was the decision of the citizenship of the City of New Orleans for the advent of this railroad into the City of New Orleans?

A. Very anxious to acquire it and loaned me every assistance possible.

Q. First, you selected the route of the road; did you then submit an ordinance to the City Council?

A. We decided upon location and acquired about sixty per cent of the property and then we submitted the ordinance to the City Council.

Q. And when that ordinance was submitted to the City Council state whether or not it was taken up by the commercial bodies, discussed and passed upon by the several bodies?

A. Yes; signally and unqualifiedly.

359 Q. State whether or not you appeared before the exchanges and if so before what Exchanges?

A. Practically at all of the conferences; I was present with the Committees of the Board of Trade, the Progressive Union, Cotton Exchange, Maritime Exchange, Sugar Exchange and the Lumbermen's and Dealers' Exchange and the New Basin Canal Board, the Levee Board, the State Board of Engineers and the Board of Health; practically all of the public bodies.

Q. In discussing this ordinance with such bodies state whether or not they had the ordinance before them and state whether or not they did discuss it critically?

A. Yes, and nearly always it was referred to their attorneys and we would meet at an appointed time for discussion and amendments.

Q. State whether or not the ordinance as originally introduced was amended in several instances by suggestions from the different commercial bodies?

A. Yes sir, the principal changes in the ordinance were made by the Board of Trade, Progressive Union and New Basin Canal Board.

Q. Were such changes made?

A. Yes sir, and also a meeting of the citizens resulting in the location of our proposed terminals. We changed the ordinance on the advice of some of the different citizens from the locality to where it was transferred.

Q. During the time that this discussion was going on state whether or not this Belt road feature of the ordinance was thoroughly discussed?

360 A. This Belt road proposition we had been given to understand in different ways, we would have privileges of the river front for our export facilities. The Frisco was about to enter the City about the same time; they jumped in ahead of us

and I was taken sick in the hospital, and at the time they asked for exclusive privileges on the river front and our ordinance was introduced and theirs was passed. Before our ordinance was passed we appeared at several of the Council Committee meetings and changed the Belt features considerably from what we requested.

We requested the rights the Frisco requested when they first introduced their ordinance.

The modification of the Frisco ordinance to require control of the city front was due entirely to the Frisco ordinance.

Q. Whatever preservation of the river front was reserved in that ordinance was due largely to the fact that Mr. Edenborn representing your company and yourself and Mr. Elerbe was that you would build the Belt road yourselves and turn it over to the City?

A. At first the Council gave us a deaf ear, and the commercial bodies took up our proposition and forced — upon the City Council and public sentiment did so. The Frisco officials had knowledge that we were coming to the City and Mr. Yokum entered into an agreement with Mr. Edenborn in New York,—they wanted to get to the river front and they bought some property belonging to a Protestant Asylum near Henderson Street, and they said that they would make it, so Mr. Edenborn could get in as well as the
361 Frisco, and when they asked for their ordinance they asked for the exclusive privilege.

Q. Then the feature of the Frisco was modified so as to leave the Belt Road under the control of the City?

A. Yes sir.

Q. What followed immediately after the passage of the Frisco ordinance?

A. Our ordinance was introduced about the time; while our ordinance was under consideration the Summer came on and the ordinance was discussed in a half hearted manner by the different bodies until the Fall.

Q. Was any action taken on the Frisco ordinance?

A. Not by the City Council; the Frisco ordinance was passed over the Mayor's veto.

Q. After this litigation was over and your ordinance was passed what did your road do towards building into the City of New Orleans?

A. We were building all the time and we went ahead with our plans and constructed the road.

Q. There is a provision in the Frisco ordinance that they should build a road by July, 1904, and when litigation arose a resolution was passed by the City Council extending the time claimed—

By Mr. GILMORE: I object to the question as leading, and the ordinance speaks for itself, and I submit that no extension could be made to either of the ordinances by any statement—

By the COURT: As I understand it now, the inquiry is how did your road construe that ordinance or resolution and how was it construed by the City authorities?

362 By Mr. GILMORE: I object as to how it was construed by the City authorities.

By Mr. MILLING: Cut it out; how was it construed by your road?

A. That our ordinance,—that part of it pertaining to the Belt,—be predicated on certain conditions of the Frisco; whatever changes affected the Frisco ordinance extended to ours, and any extensions granted the Frisco was a relative extension of our time.

Q. You mean the provision of the ordinance relative to building the Belt road?

A. Yes, that particular feature.

Q. Well, then, what time did you figure that the Frisco had in which to build the Belt road?

A. I don't remember the date.

By Mr. GILMORE: I object; that is a matter of argument and the records will show that.

By Mr. MILLING: I am going to show that he made the deposit of fifty thousand dollars required by that ordinance.

NOTE.—Argument by counsel.

By the COURT: Suppose you get the date when he made the deposit and his reasons for making it on that day?

By Mr. MILLING: We offer in evidence the judgment of the Supreme Court, reported in the 112 La., being the case of the Board of Port Commissioners vs. New Orleans & San Francisco R. R. Co., and

363 instead of copying it in the record we will refer to it in the printed report itself in order to show the date when it was decided and the date when the rehearing was refused and when the judgment became final.

By Mr. MILLING:

Q. Now, Mr. Saxton, the Dock Board case was decided,—I'll give you the date,—I've got it down here, May 23rd 1904, and the rehearing refused June 20th, 1904; now state when you made the deposit?

A. November 10th, 1905, with the Interstate Trust & Banking Company.

Q. Why didn't you make it before?

A. It was delayed on account of litigation.

Q. State whether or not your Company considered that the Frisco had the right to build the road up to that date?

A. Yes sir.

Q. Up to the final decision in the Dock Board case?

A. Yes sir.

Q. That was considered the day?

A. Yes; and on the last day on which they had to build it we deposited the fifty thousand dollars.

Q. Did you make the deposit yourself?

A. Yes sir.

Q. Was there any objection or protest made?

A. No sir.

Q. Did you ever receive any protest?

A. No, I filed a certified copy of the ordinance with the deposit.

Q. Were they still in possession of the deposit as long as you were connected with the railroad?

364 A. Yes. I had them notify the City immediately and Mr. Young of the Interstate Bank copied certain sections of the ordinance in his notification to the Mayor and the City Council of the deposit.

Q. Something has been said of an attempt made to change the bonds; what about that?

A. There was never any attempt made on the part of the railroad company to do anything with that deposit except at the semi-annual period to tear off the coupons. The bonds were bought through Mr. Sol Wexler of the Whitney-Central National Bank, and he having acquired the bonds for the Company and having use for them took it upon himself to ask the City the privilege of changing them with the authority of the railroad Company.

Q. Mr. Saxton after you made this deposit state whether or not you were still with the Company at the time when the laborers of the company were attempting to build the belt railroad?

A. Yes, I had some material up there and I was present in Court when the Engineer of the Company was discharged; he was the only one who was arrested.

Q. Are you acquainted with the Willoe Grove landing?

A. Yes sir.

Q. Are those the river terminals that are spoken of in that ordinance?

A. Yes sir, those are the ones that are referred to.

Q. And as I understand you you contemplated going over the belt road to these terminals?

A. Yes sir.

Q. What was your purpose in acquiring these terminals?

365 A. To be used for the export end of the business of the company.

Q. You also know something of the acquisition of the right of way from the main line track down to a point near protection levee?

A. Yes sir, I acquired it.

Q. What was the object of building that piece of track?

A. To reach the upper end of the Belt tracks, that is, the end adjoining the Parish of Orleans and Jefferson.

Q. Were you in charge also during the time that the Poydras ditch was being filled?

A. Yes, sir, it was built.

Q. This right was acquired under the ordinance—the railroad was acquired under the ordinance to fill that ditch?

A. Yes sir.

Q. Did you do it?

A. Yes sir.

Q. Did you place tracks on it?

A. Yes sir.

Q. How are the other railroads treated in reference to canals in this City? Did they have to fill ditches up to put their tracks on?

A. I don't know of any other railroad except the New Orleans &

Western or the Frisco. They run along the Banks of the Florida canal.

Q. State whether or not in your opinion the filling of the Poydras ditch was of benefit to the City of New Orleans?

A. It filled up and got rid of the ditch which was part
366 of the original drainage system of the City, and under the new system is obsolete.

Q. What was the character of the excavations or pond left there when the drainage system was changed? Was it stagnant?

A. It was not entirely so, but it was neglected.

Q. State whether or not you consider that an advantage to the City of New Orleans?

A. Yes sir, it was.

Cross-examination by Mr. GILMORE:

Q. The advantage that the City of New Orleans got from the filling up of the Poydras canal, which was public property was that it was filled up?

A. Yes sir.

Q. And what advantage did the Louisiana Railway & Navigation Company get?

A. Well, the use of it for their track.

Q. They got exclusive practically perpetual use of all of that property, didn't they, as a result of filling it up?

By Mr. RANDOLPH: That would be a matter of law; there is no private ownership possible in that situation.

By Mr. GILMORE:

Q. Do your tracks take up the whole space originally occupied by the Poydras ditch?

A. Yes sir.

By the COURT: Any body else's tracks on it?

A. No sir.

By Mr. GILMORE:

Q. You have exclusive use of it?

367 A. Yes sir.

Q. In regard to this deposit, let's get ourselves straight on that. The Frisco ordinance was introduced when?

A. I don't remember all those dates; I figured them all up at the time.

Q. When was your ordinance introduced?

A. In February, 1903.

Q. And the Frisco ordinance had been introduced prior to that?

A. Yes sir.

Q. Then, after the Frisco ordinance was passed and litigation arose, the ordinance already offered in evidence was passed extending the time of the Frisco for the execution of its contract; is that the fact?

A. Yes sir; resolutions were passed.

Q. Then, after that your ordinance was passed?

A. Yes, but our ordinance had been introduced prior to that resolution.

Q. But your ordinance was not passed until after the adoption of that resolution?

A. Yes sir.

Q. Is not your ordinance the last ordinance on the subject and was there any other legislation except this ordinance extending the Frisco's time, passed prior to your ordinance?

A. None that I know of.

Q. Then your ordinance was the last legislation in regard to your rights?

A. Yes sir.

368 Q. Don't your ordinance fix the date for the deposit?

A. Yes sir, it did.

Q. Wasn't that date in July, 1904?

A. It was predicated though on the Frisco.

Q. Is that your ordinance?

A. Yes sir, that is my recollection.

Q. Can you find in your ordinance where the date fixed for your deposit is predicated on the Frisco?

By MR. RANDOLPH: On page 6, paragraph (c)——

A. Yes sir, paragraph c, section 3 on page 6: "That in the event of the New Orleans & San Francisco Railroad Company, its successors or assigns, failing, without legal excuse to build said belt tracks from the upper side of Audubon Street to Henderson Street, on or about July 1st, 1904, the Louisiana Railway & Navigation Company shall build the same from the upper side of Audubon Park to Henderson Street, under the terms and conditions of paragraph 10, section 2, of ordinance No. 1615, N. C. S., and, in case said Louisiana Railway & Navigation Company shall build said track, it is hereby granted the right and privilege to operate its trains, cars and traffic over the said tracks, under all the provisions and terms of said paragraph 10 of section 2 of ordinance 1615 New Council Series, etc., etc."

Q. Now, isn't it a fact that your ordinance required you to make that deposit on or before the 1st of July, 1904? Look at the preceding paragraph. Wasn't there a fixed date for that deposit by the last legislation on the subject?

A. In that paragraph I don't see it Mr. Gilmore.

369 Q. I'll show it to you. The said Louisiana Railway & Navigation Company shall on July 1st, 1904, deposit with the fiscal agent of the City of New Orleans bonds or other securities satisfactory, etc. Wasn't it your express obligation under your contract and an unconditional contract that you should make that deposit?

A. The same paragraph goes on to say: "the same to be held in escrow as security for compliance by said company with the foregoing obligations."

Q. Then there was a fixed date for your deposit of the \$50,000.00 of bonds by the last legislation on the subject?

A. Yes sir.

Q. You did not make your deposit within that time?

A. We didn't make the deposit on July 1st, 1904.

Q. Now, you have testified that you acquired for the right of way. First, how much did you pay for that mile of switch track just above protection levee?

A. From the protection levee to the Main line I think that was transferred from the main line to Dakin for about sixteen thousand dollars.

Q. Is that the whole length?

A. That is the right of way itself.

Q. From the junction to where the connection was to be made?

A. No sir, there are three other pieces.

Q. How much did they all cost?

A. We acquired some other property in there Mr. Gilmore.

Q. I know, but I am talking about the roadway?

A. About twenty two thousand dollars.

370 Q. Then all of the balance of the sixty thousand dollars for that one mile of track went for the cross ties?

A. I don't know anything about the cost; it may be Mr. Edenborn included in that another piece of property that he purchased.

Q. Wasn't it intended and is it not a fact that the Louisiana Railway & Navigation Company were to establish a yard just above the protection levee on the river where this connection with the Public Belt Railroad track was to be made?

A. I don't know anything about the original plan to establish a yard there.

Q. Was there not always to be a yard there?

A. I don't know it, but we made provisions for a few switches.

Q. You were to make provision for some switch tracks there; do you remember how many?

A. I think the right of way is seventy five or a hundred feet wide.

Q. Where was a yard to be located; I mean above the protection levee?

A. There was to be a yard on the Willow Grove property.

Q. And above protection levee?

A. There was one yard at the connection where the railroad company's Public Belt Connection left the main line.

Q. And you testified that there was a public rejoicing over the fact that the Louisiana Railway & Navigation Company was coming into the City of New Orleans?

A. Yes sir.

371 Q. Is it not a fact that there was public opposition to the Frisco river grant?

A. Yes sir, and also there was public opposition to the grant of our terminal.

Q. On the river front?

A. Yes; there is always opposition to anything that is good.

Q. What changes were made in the original Frisco ordinance relative to the river front right?

A. Under the original ordinance as I remember it as introduced

they were to have the control of these Belt railroad tracks and operate it as such.

Q. Is it not a fact that the paragraph covering the Frisco grant to the river front right was never amended?

A. No sir. My recollection is that it was materially changed and possibly I have some of my old papers of the original Frisco ordinance.

Q. Is it not a fact that the Frisco people proclaimed from the beginning to the end of the legislation and litigation that they did not desire and did not ask exclusive control of the river front, but the theory of their ordinance was that all railroads should operate with their own engines?

A. No sir; my mind is now becoming more clear.

Q. Of course any amendments that were made would appear of record in the City Hall?

A. Not necessarily; they were changed in Committee.

Q. That would be an official record?

A. If the official records could be found it would show these things.

372 By Mr. GILMORE: On behalf of the City of New Orleans we offer in evidence the minutes and the entire record of the official proceedings connected with the passage of the New Orleans & San Francisco Railroad Company's ordinance, and the Louisiana Railway & Navigation Company's ordinance.

By Mr. RANDOLPH: We would like to inspect these in time to see how far we may wish to combat what Mr. Gilmore offers. If you can submit them to us before we close the case it will be all right.

By Mr. GILMORE: I'll have them here to-morrow morning.

By Mr. GILMORE:

Q. Did not the New Orleans Picayune oppose the passage of the Frisco grant so far as to allow them to operate at least along the river front?

A. Yes sir.

Q. And didn't the Daily States?

A. Yes sir.

Q. Didn't the grant to the Louisiana Railway & Navigation Company, the same grant as to the Frisco, meet with opposition by those papers?

A. I don't recollect really Mr. Gilmore that the Picayune and States opposed the Frisco ordinance on these grounds alone; I think they also referred to the grant on Basin Street.

Q. But didn't they oppose the ordinances on the ground that the grants on the river front would be against the public interests of the City?

A. I can only answer that their position would be inconsistent, because our ordinance was not passed.

373 Q. Is it not a fact that your ordinance was passed after the Supreme Court decided in favor of the Frisco and before the Dock Board case was passed upon?

A. I am not sure about the dates.

Q. Did you follow the course of proceedings in the Frisco matter?

A. Yes, as a party interested.

Q. Don't you know as a matter of fact that counsel for the Frisco railroad in open Court disclaimed any intention of securing for the Frisco railroad exclusive use of the river front?

A. I don't recollect.

Q. Is it not a fact that such a disclaimer was entered of record in the Supreme Court in writing?

A. I don't know.

Q. What changes were made in your ordinance in regard to that provision relative to the river front after it was introduced?

A. Why, my recollection is that,—well, one was that we were to build in—that was an amendment that was offered to us by the Board of Trade that we were to come in on our own rails.

Q. What amendments were made which deals with the right to operate your trains over the Public Belt tracks?

A. My recollection is that several were made, but the verbiage I don't remember particularly.

Q. What important amendment was made?

A. As to the fixing of the date, as to when the deposit should be made showing good faith on our part, that the Belt railroad tracks would surely be built.

374 Q. Was that a change?

A. Yes, I think so; that is my recollection; it is some time back and I haven't been connected with the railroad much for some two years, and these things are rarely raised in my mind.

Q. What terminals did you acquire in the rear of the City?

A. We acquired property between Julia and Cypress, from Liberty Street, back to Claiborne Street, then from Julia and Cypress, that is between those two streets, from Claiborne back to Galvez, practically all of it, then from Derbigny between Cypress and Lafayette back to the intersection of Galvez, from Galvez between Poydras and Lafayette back to about Rochelblave, then the City ditch or Poydras ditch, which took up to Carrollton Avenue; we acquired two squares at the intersection of Tulane Avenue and Carrollton Avenue, and a 300 or a 350 strip together with four or five extra squares between the protection levee and new basin canal, and then for another yard out in Jefferson parish a strip 350 feet wide, say 150 feet in addition to the 100 feet right of way from the protection levee where the L. R. & N. intersects with the New Orleans & Western or now the Frisco tracks.

Q. You have the right of way from the City of New Orleans to reach all these terminals?

A. Yes sir.

Q. And you are in possession of that now?

A. Yes, to the best of my knowledge.

375 Q. You are in possession of every property or every privilege given by you by this ordinance except the use of this river front?

A. Yes, but the other properties were all acquired by purchase except the Poydras ditch.

Q. And what consideration did you give the City of New Orleans for the Poydras ditch?

By Mr. MILLING: We object; the grant itself is the best evidence.

By Mr. MILLING:

Q. Mr. Saxton, why didn't you make the deposit on July 1st, 1904, as stipulated in the ordinance as it would appear you were required to do under the ordinance?

A. We were only required to make that deposit in the event that the Frisco did not comply.

By Mr. GILMORE: I object; let him produce the ordinance.

By the COURT: State the reasons.

A. Our interpretation from our information from our attorneys was in effect that the time limit had been extended, and we didn't make that deposit waiting until the time had actually expired, and on our figuring we had to wait until the last moment. If the Frisco had built in what position would we have been if we had made the deposit before the last day that the Frisco had to build it.

By Mr. MILLING:

Q. Was July 1st the day on which the Frisco was to complete the road?

A. Yes, it was, unless they had some legal excuse.

Q. Litigation arose and the time limit was extended from July 1st, 1904?

376 A. Yes sir, for the corresponding period during litigation and we figured the date occupied by the litigation from July 1st, 1904 which brought it to November 10th, 1905, and the deposit was made on that day, the Frisco not having complied.

Q. You were asked if the Frisco was not virtually the same ordinance as your own, that is, as far as the river front is concerned; just examine section 10 and paragraph *d*; read it?

A. "That said tracks shall upon the completion of the City's Public Belt system to Clouet Street be under the sole and exclusive control of the City of New Orleans." In other words it was not to be turned over to the City of New Orleans by the Frisco until it was completed to Clouet Street.

Q. How far is Clouet Street from Henderson Street?

A. I don't know, sir.

Q. The Frisco ordinance don't contemplate that they were to build to Clouet Street?

A. No sir.

By Mr. GILMORE:

Q. You didn't lose anything by making this deposit of bonds?

A. No sir, the money has been paying four per cent.

Q. The bonds are there yet; the City of New Orleans has not taken them?

A. Not to my knowledge.

By Mr. MILLING: We object.

By Mr. GILMORE: I withdraw the question.

377 By Mr. GILMORE: Is it not a fact that I informed you that the City never recognized that deposit?

By Mr. MILLING: I object; the way to have acted was by written resolution or motion or written communication by the authority of the City to its fiscal agent, and to have instructed that agent to deliver the bonds back, or instruct him not to accept them, and the declaration of the attorney cannot affect the issue.

By the COURT: Let the objection go to the effect.

A. Yes sir.

By Mr. GILMORE: I was acting in my official capacity as City Attorney.

A. Yes, you were City Attorney.

By Mr. MILLING:

Q. Was Mr. Gilmore acting in his official capacity? Did he tell you that he was acting in his official capacity as City Attorney?

A. I saw him as City Attorney.

Q. He was the City Attorney and he told you that?

A. Yes sir.

378 H. B. HELM, who being first duly sworn by the Minute Clerk testified as follows:—

Direct examination by Mr. MILLING:

Q. Mr. Helm, where do you live?

A. In the City of Shreveport.

Q. What connections have you with the Louisiana Railway & Navigation Company?

A. I am Secretary and General Superintendent.

Q. How long have you been employed by this Company in that capacity?

A. I have been with the Company since July 1st, 1901, and I have been in this position since 1904.

Q. How long have you been connected with railroads or in the railroad business?

A. Over fifteen years.

Q. Are you a practical railroad man?

A. I claim to be, yes.

Q. You are familiar with the cost of operation and maintenance of railroads?

A. Yes sir.

Q. A question has arisen in this litigation as to whether or not it would be practicable to operate the City Public Belt and at the same time to permit the Louisiana Railway & Navigation Company to operate its trains or cars over the City Belt under its ordinance, the City having control of the operation? I would like to know of you as a railroad man whether or not such a proposition is practicable?

A. It is entirely so; there would be no necessity whatever for any confusion to arise unless one or the other of the parties deliberately sought confusion.

379 Q. Just explain to the Court how it could be done?

A. Well, it was done in innumerable cases and at many points every day; the probabilities are that in case of an operation of this kind was gone into the authority and control being in one of the parties, that party would formulate a set of rules governing the operation, as is usually done, and the employes of the operating line would not be allowed to operate until they had been examined as to the rules of the owning Company. They would then be known to the owners of the line to be just as capable of interpreting the rules of that Company as their own employes and to be subject to the rules as much as though they were carried on the pay rolls of the owning line.

Q. That being the case, your employes having been examined by the Belt Commission and understanding the rules, could they reach the Belt if they were placed under the direction of the Belt Commission or their representatives and management, and is there any reason why the trains of the Louisiana Railway & Navigation Company could not be operated on the road just the same as the engines and cars of the Public Belt?

A. None whatever.

Q. Give us an instance in which such joint operation is carried on?

A. Well, there are a great many cases that we can't come in contact with on our own line that would probably be familiar with most everybody here. In the case of the terminal Company here we among other lines operate over their track and under their rules.

380 Q. How many roads come in on the tracks of the New Orleans terminal company?

A. There are three separate branches; the Northeastern, the New Orleans & Great Northern and our own Company. At Alexandria, in this State, the Iron Mountain and the Texas & Pacific have joint yards, and each has and operates its own switch engines in those yards, trains of both companies run in and out of the same depot, but all their freight business is entirely separate from that. They come on the same tracks. At Shreveport there are several roads running in over the same tracks, the Kansas City Southern, our Company operates its passenger trains over the Vicksburg, Shreveport & Pacific track in Bossier and Shreveport, and the Red River Branch and the M. K. & T. also has use of the Southern & Pacific yards; we operate our freight trains over part of the Cotton Belt tracks in Bossier City, and over the Red River branch, and over part of their cotton yards in Shreveport; both companies operate switch trains—

By Mr. RANDOLPH: These instances which you are relating have they ever presented any practical difficulty?

By Mr. MILLING: Or confusion?

A. None in the least.

Q. State whether or not the Southern Pacific—the Morgan's Louisiana & Texas R. R. and the Illinois Central, come into New Orleans over the same track from Harahan or use the same terminals for its passengers?

A. Their passenger trains do, yes.

381 Q. And you say that there is no difficulty in carrying on such a joint arrangement in handling trains?

A. There should be none.

By Mr. MILLING: I don't know whether your Honor thinks we should go into the question of transporting these cars; they have had a great deal of evidence on it, and they have taken evidence on it for two days.

By Mr. MILLING:

Q. Mr. Helm, there has been considerable evidence in this case as to whether or not it would be cheaper for this railroad company to have its own terminals and operate its own trains or to let the Public Belt attend to that part of it for them. Now, state whether or not it would be to the advantage of this Company to be confirmed in its grant of its right of way over the Public Belt track to its terminals or whether the Public Belt track is preferable?

A. It would be very much to its advantage with the present business it is handling to have the advantages contracted for in the ordinance in question, and the more the business would grow the greater the advantage would be. At the present time that part of the business that is handled by the Public Belt within the limits of this ordinance would give us trackage rights, and now it costs us an extra amount, and will cost us more too for switching. In other words as we are now operating with the business that we have, and we had the privilege we are entitled to we could handle those cars without any additional expense over the section that has been necessary for us to do it.

382 Q. Please explain that?

A. Well, if the plan of the railroad had been carried out as was contemplated before the construction of the line, and we would have had a yard out at the junction where the trains would have come in, and as now located it is necessary to keep two switch engines at work, and the distance from our present yards is very great, out to the Belt and out to the Terminal Company's connection and it has been impossible for one switch engine to serve down town for these two connections; but the work could have been arranged to have the trains made up and broken up so that one switch engine could have handled down town trains and the other could have served the terminal and placed all of the cars on the Belt; and if we had wharves at the Willow Grove landing we could have done all the work there. Two switch engines could have taken care of all the cars that we have been operating this winter.

Q. When your train is broken at the protection levee what becomes of that crew?

A. Well, of course different plans might be worked out, after

a certain amount of experimental business had been done, but my present idea would be that the most economical method of handling business would be on the plan just outlined. It would be even more economical however if we had one through full train of export business going to the Willow Grove landing operating directly there.

Q. If you had such trains you would operate them directly there?

383 A. Yes, that would be my idea.

Q. In addition to the advantage of operating trains over the right of way as had been granted to you, what delays would you suffer in having to turn over your business to the Belt Railroad?

A. They only make one delivery a day under the present arrangement with the Public Belt. If the Belt is down town going out there and we get out there on time, we have to wait until they come; if some unavoidable accident occurs in your yard, which delays beyond the time they come out there, and we are not there to give them any cars, they go back and we cannot give them anything again for twenty four hours, and we frequently handle cars that are in fact under the Interstate Commerce Commission rules, which we could handle if we handled them ourselves, and if we delivered them to another line they would not be justified in accepting them.

Q. Does the Interstate Commerce Commission regard the Public Belt Railroad of the City of New Orleans as an independent line?

By Mr. GILMORE: I object to the question, your Honor.

By the COURT: If it does treat it as an independent line what you say applies. If not, it does not apply.

A. Yes sir; I have a communication from the President pro tem. of the Public Belt Commission, saying that they filed their tariffs with the Interstate Commerce Commission but under protest; but as far as our regulations with the Public Belt is concerned we have to go along the line under the requirements of the Interstate

384 Commerce Commission.

By Mr. MILLING:

Q. Suppose you brought in a lot of cars which you desired to carry to your terminals five or six miles, and you had some disabled cars, and those were technically unfit for use, would you be permitted to take them on down to your terminals?

A. Yes, if we had tracks and were operating ourselves, yes.

Q. As it is if you offered them to the Public Belt and they were rejected, they would have to be turned over to them?

A. Yes, and there is no method by which you can estimate a railroad company's loss in revenue occasioned by interruption or delay in service.

Q. Suppose you had some cars you wanted to return, would you put them on the track and send them to the Morgan Railroad wharves, how would you get those cars back if the Morgan Company desired to appropriate them themselves?

A. There is no way of enforcing their return.

Q. Have you had any trouble in that way?

A. Yes; we had a great deal of trouble when we first commenced to operate here; we lost pretty near all we had that we owned.

Q. What is the rules of the railroad company with reference to getting hold of the other fellow's cars and keeping them?

A. The rules are that the cars are to be returned, but
385 in times of car shortage, which was in existence at the time we began operating in New Orleans, most every railroad was taking almost every car they could get hold of, and as all our business practically was loads to be delivered to other lines and none coming to us, they came pretty near getting all the cars we had.

Q. There were some estimates offered here to show the gross delivery by your Company to the Public Belt. State whether or not you began business with the Public Belt as soon as it was opened?

A. No sir, we did not; that estimate shows the percentage for about seven months, and the small showing was effected by the fact that the Belt Commission began operating about August 17th, and we had no connection with them until after this temporary arrangement which has been referred to was made, and then our connection was made about the 17th of September, and one month of that time we didn't operate in connection with them at all, and from the middle of October to the middle of November we didn't have any opportunity of delivering anything to them, and consequently two months out of the seven, where we are compared with other roads and still we have had no opportunity of delivering as the other lines did, and I think in January and February we gave them more cars than any other line; but the report will show.

Q. In the beginning, did you have much trouble with the operation of getting your cars in and out?

A. It was not very satisfactory. At first the Belt people seemed to show a willing disposition but didn't seem able to take
386 care of our business, and further, as long as they were limited in their supply of locomotives which I think was due partially to the amount of dirt they were handling for levee purposes.

Q. How did they finish the contract, or have they finished the contract?

A. I think so. I went with our agent once to see Mr. Porch to make a formal complaint against the manner in which our business was being handled.

By Mr. RANDOLPH:

Q. Do you know the general policy of the Company in its plans for entering New Orleans and getting these contracts from the City of New Orleans?

A. Yes sir.

Q. Did they contemplate that the company would reach the ship's side over its own rail and through its own dock and landing?

A. That was not only contemplated, but plans were based on that subject.

Q. I say that the ordinance has finally passed by the city would have enabled you to carry out those plans?

A. Yes.

Q. That is if you were permitted to?

A. Yes sir.

Q. What have you to say as an experienced railroad man as to the advantages of such plans give to a railroad which has to depend upon a so-called public service to reach the water's side or public docks?

A. Well, a railroad is in a much better position from every point of view if it could keep control of its own equipment and handle it to suit the best interests of its own customers.

387 Q. Does that apply where they are enabled to control their own docks and water side?

A. Certainly it does.

Q. Is it not so regarded in the railroad world as a very valuable right and far superior to the rights offered by the Public Belt system here?

A. Very much superior, yes sir.

Q. You know that the Illinois Central is one of the largest and richest railroad corporations coming into the City of New Orleans?

A. Yes sir.

Q. And you know that the Southern Pacific is the largest and richest railroad corporation entering the port of Galveston?

A. Yes sir.

Q. In both instances, Galveston and New Orleans, have these railroad companies their own private docks?

A. They have here, but I don't know a thing about Galveston.

Q. And they reach those docks practically over their own rails?

A. Yes sir.

Q. Do you as a railroad man consider that a feature in the development of the business?

A. Yes sir.

Q. So, that what you wish to acquire and equip yourself with when you presented yourselves to the authorities here in New Orleans asking for these privileges, was this very thing?

A. Yes sir; so as to be on an equality for competing for business with them.

388 Q. Is that what you had in view as the most expeditious plan of making your railroad company a powerful commercial factor and getting good and quick return upon the money invested?

A. Yes sir.

Q. Referring to this theory of public service as presented by the Public Belt authorities as being in the long run better even for the railroads, do you know of any railroad corporation that has its own facilities and who are using them, that has ever in point of fact contemplated turning these facilities into some other use and surrendering that function to the Public Belt Railroad authorities?

A. No sir, I do not think that any railroad would do that.

Q. And why not?

A. Because, as I attempted to bring out before, they are in better shape to handle their own business with the Public if they can handle it at times in such a manner as best suits their customers.

Q. If their objective point in their movement is to get to the ship's stern the important principal is to keep control of their movement until they get there?

A. Yes sir, it is very important; I might say that the indirect loss would be far in excess of the direct payment of the switching charges. The fact that you have to deliver your cars to connecting lines makes the cost of the switching charge very little compared with the delay.

Q. That is not larger than the loss?

389 A. The delays incident to the movement, the loss of business, through the equipment being tied up, on connecting lines for a longer length of time — necessary, and if you handle them yourselves you will not meet with that loss of business through delays.

Q. Does the fact of a railroad entering a great seaport like New Orleans, controlling its own terminal facilities make a more powerful appeal to its connecting lines in the interior than railroads that depend upon the so-called public service?

A. Yes sir.

Q. To what extent then would that affect the growth and development of your property?

A. It affects it very largely; we are not regarded now as an export line; it is generally known that we are not in a position to get business direct to the ship's side.

Q. Is the Illinois Central regarded in that category?

A. No sir.

Q. Is the Texas & Pacific regarded in that category?

A. They are supposed to have good terminals at Westwego.

Q. Right on the water's edge?

A. Yes sir.

Q. That is a private wharf?

A. I think so.

By Mr. GILMORE: Is the Northeastern.

A. Yes, it has, through the terminal company.

Q. Has the Northeastern any wharf for loading and unloading?

A. They have a wharf that they always control.

Q. Is it ever used?

A. I can't say.

390 Q. Has the Morgan line any private grant on this side of the river?

A. I don't know if the Morgan has a private grant, but they have a New Orleans port to which they can handle business to their terminals, whereas we have not.

By Mr. RANDOLPH: I haven't turned the witness over for cross-examination.

By Mr. RANDOLPH:

Q. What facilities have you for handling grain for export?

A. We are not in a position to handle any grain at all. We do handle it at the present time as far as Baton Rouge, and in order

to get it through the Port of New Orleans we have to deliver it to the Yazoo & Mississippi Valley.

Q. Has any of your connections ever had this question of transporting grain for export up with you?

A. Yes sir, we had them up very actively last Fall, and there was quite a big volume of business that would have been turned over to us if we could have advised them that we could handle it, and we were forced to advise them that we could not.

Q. What do you do with local corn?

A. There has not been a great amount of it so far, but there will be; the cotton people on account of the boll weevil this year in most of the Red River Country will put their lands into corn, and I am frank to admit that we don't know what we are going to do with it; it will have to be exported and they have to depend upon our getting it to the market.

391 Q. Have these local producers taken up this question with you?

A. Yes; we have it up now.

Q. You haven't yet solved the problem?

A. No sir.

NOTE.—The further hearing of testimony in this cause was continued to Thursday morning April 1st, 1909.

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THURSDAY, April 1st, 1909.

This cause came on this day for further testimony.

Present: The Hon. John St. Paul, Judge, and all parties in interest represented by counsel.

Governor J. Y. SANDERS, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. MILLING:

Q. Governor, you were at one time a member of the law firm of Foster, Milling, Godechaux & Sanders?

A. Yes, up to January 1st, 1907.

Q. This suit was filed in June, 1906, and the question has arisen why it was not tried right away and disposed of. Our pleadings show that we were attempting to compromise this suit, or had hoped to compromise it. Now I wish you to state whether or not you had any conversation with the Mayor or City officials in reference to compromising this suit, from June, 1906, up to the time of your withdrawal from our firm.

A. I had numerous conferences with Mayor Behrman and Mr. Gilmore, who was City Attorney and likewise chief attorney for the Public Belt Railroad Commission, and I had conversations, some with the Mayor and other public officials, both before and after the filing of the suit.

Q. What was the policy of the Company, and why the object of attempting to compromise the suit?

393 A. The policy of Mr. Edenborn, as outlined to me, and I handled all of this business connected with this railroad practically up to the time I left the firm. His policy was that he didn't want any litigation with the City of New Orleans or any of its subsidiary bodies, like the Public Belt Commission because he thought litigation was a bad policy and so did I. Our minds were mutual on that point.

Q. In his ordinance he was required to deposit on July 1st, 1904, \$50,000.00 of bonds with the fiscal agent of the City of New Orleans; litigation arose between the Frisco Company and Mayor Capdevielle, and also between the Frisco and the Commissioners of the Port of New Orleans, and this deposit was not made on July 1st, 1904, but made in November, 1905. Just state upon whose advice this deposit was made at that time and why not made earlier.

A. The reason it was made on the date that it was upon my advice to Mr. Edenborn for the reason that I gave him then, that the suits which had been litigated between the City and the Frisco and the Dock Board, and that the Frisco people had held that provision of the ordinance in abeyance, and the date that was fixed in my opinion with Mr. Edenborn was the date that he did make the deposit.

Q. Then there was no disposition on his part to shake the responsibility of depositing the \$50,000. of bonds on the day that he should have deposited them?

A. He made the deposit on the day that I advised him that he should make it.

By Mr. GILMORE: No cross examination.

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H. B. HELM.

Cross-examination by Mr. GILMORE:

Q. Mr. Helm, you stated yesterday, when you gave reasons why it was better to have the operation of your trains along the lines indicated by your ordinance rather than have your cars handled by the Public Belt Railroad; those two reasons, as I remember were first, under the present arrangement there were delays in the movement of your cars due to the fact that the Public Belt was giving only one service a day, and the other reason was that if you hauled them yourself you carried damaged cars. Now, would not that first objection be obviated by increased service on the part of the Public Belt?

A. Not altogether Mr. Gilmore. Of course, two interchanges a day would be better than one, but there would be an interchange in either case and the inspection of cars and the necessity of having your own work lined up to meet these demands would at times necessarily cause delay.

Q. As you would have to break your trains unless they were solid, and if you operated under the ordinance you would have to operate under the rules of the Public Belt in such a way as to allow the Public Belt to handle other railroads at fixed certain times?

A. We would have to have certain regulations but not at certain times a day but at certain stated times. I don't think there would be any objection on the part of the Public Belt to allow us to use the tracks when they were not using them themselves.

395 Q. I ask you as a practical railroad man could not the arrangement be made with the Public Belt equipment to handle the cars from the junction down to Octavia Street, just as well as you were handling them yourselves?

A. No sir, because you could not avoid the delay incident to delivering cars to another line.

Q. Suppose they took your cars to Octavia Street, where would the difference be if they gave you the same equipment that you have yourselves?

A. Whenever the car went into their possession the inspection and delay in that case would be just the same; there would be no objection to their running over our track, to take the cars at our connection.

Q. And then it would be a question of inspection?

A. Yes sir.

Q. The advantage of your operating to so avoid the inspection is that you get the right to carry damaged cars to your terminal; is that the only right?

A. No sir, the line of your questioning is to get me to testify to that but that is not my testimony.

Q. What do you fear from an inspection?

A. The delay of the equipment that could be safely handled through to destination by a carrying line, but could not be handled by a connecting line.

Q. In other words the carrying line would be able to take cars down to its terminals that the connecting line could not?

A. Yes sir.

Q. Those being cars not in good order?

396 A. Yes, they may be perfectly safe, but they may not meet the requirements of the Interstate Commerce Commission and the rules of the Master Car Service Association.

Q. Of course, the Belt Railroad operates as you do under the car service rules?

A. Yes sir.

Q. And the Public Belt operates as you do also under the car builders' rules?

A. Yes sir.

Q. Is there any more trouble in delay with the Public Belt, or is it the same as the Southern Pacific in so far as your road is concerned?

A. Exactly.

Q. You spoke of cars being used elsewhere, but do you know of any situation like that in the City of New Orleans where there is a public wharf system served by a Public Belt system other than a private wharf and Belt road system in the City of Galveston?

A. I don't know of any other case where the Public Belt system is owned by the municipality.

Q. Do you know of any where except Galveston?

A. I think the St. Louis situation is pretty much the same.

Q. Don't that differ? It don't deal with the water front?

A. I don't understand that that would make any difference in handling the cars on the rail.

Q. Is it not a fact that in Galveston no cars can run on the Galveston wharves?

A. I understand that that Belt line is owned by the railroad.

397 Q. No sir; it is owned by the wharf company. Have you ever heard anything about the facilities of Galveston for any other business?

A. Yes sir.

Q. Isn't it said to be a very splendid system?

A. Yes sir.

Q. Do you know of any railroad in this City that operates its switching in opposition with another railroad?

A. I can't say for certain, but I think the Northeastern has rights in connection with the Terminal Company, but I wouldn't want to testify to that.

Q. How do you deal with the Terminal Company? Do your trains run over the Terminal lines?

A. Yes sir.

Q. With your own engines?

A. Yes sir.

Q. How do your cars go to Chalmette?

A. They are switched by the Terminal Company's engines.

Q. As a matter of fact you do business at Chalmette?

A. Yes sir.

Q. And your cars are delivered to the Terminal Company and they take them down to Chalmette?

A. Yes sir.

Q. Your freight trains operate over the Terminal Company's tracks?

A. No sir.

Q. The only arrangement that you have with the Terminal Company is to carry your passenger cars into the depot?

A. Yes sir.

398 Q. Is it not a fact that you made a contract with the Colorado Southern to come into New Orleans over your tracks?

A. Yes sir.

Q. Does that contract include the right to come down the river front?

A. No sir.

Q. What is your contract with the Colorado Southern?

By Mr. RANDOLPH: I object; I don't see the object of this inquiry, your Honor.

By Mr. GILMORE:

Q. There is nothing in the arrangement with the Colorado South-

ern which would give them the right to send their cars or trains over the Public Belt tracks even in case you win this suit?

A. No sir.

O. M. DUNN, who being first duly sworn by the Court testified as follows:

Direct examination by Mr. MILLING:

Q. What railroad position do you hold Mr. Dunn?

A. I am Superintendent of terminals of the Illinois Central & Yazoo & Mississippi Valley roads.

Q. How long have you been in the railroad business Mr. Dunn?

A. Nearly forty five years.

Q. You are familiar with the operation of trains?

A. I think so, sir.

399 Q. We have a controversy here Mr. Dunn as to whether or not two railroads can operate over the same line; we claim under the ordinance granting the Louisiana Railway & Navigation Company the right to go down the river front that it has the right to run its line and operate over the Public Belt down to Henderson Street under the supervision and absolute control of the Public Belt authorities. In other words we would bring our trains to the Public Belt and there turn over the train, engine and crew to the Public Belt authorities, and place it under their direction. I want to know from your experience as a railroad man whether or not this is practicable so as not to interfere with the general public service?

A. Yes sir, under proper regulations.

Q. Do you think there would be any confusion or collision resulting from that?

A. Not if they had proper regulations, there would not.

Q. If the Public Belt authorities had control itself it is presumed I suppose that it would make such regulations as would provide against any such confusion or collision?

A. Yes, while the trains of the Louisiana Railway & Navigation Company were on the Public Belt tracks they would be subject to the orders of the officers of the Public Belt road and their regulation and they would be practically their employés.

Cross-examination by Mr. GILMORE:

Q. The Illinois Central has two tracks down to the river from the parish line to Stuyvesant docks, and tracks through St. Joseph Street and tracks in the rear of the City?

400 A. Yes sir.

Q. Would it be practicable for the Public Belt railroad to operate over your tracks?

A. Yes sir.

Q. Would it be practicable for the Public Belt railroad to operate over your tracks with locomotives and all of its freight trains over the Illinois Central? You go from the upper Parish Line to Henderson Street, down as far as your tracks run on the levee out St. Joseph over your own system?

A. It would be practicable along the river front up to the capacity of the tracks to do the business.

Q. When would that capacity be reached?

A. That would be covered by conditions?

Q. Could you not cover that regulation?

A. When the traffic reaches the capacity of two tracks arrangements would have to be made for more.

Q. There would be the practicability of operating two railroads over the same tracks, and that would have to be adjusted by the volume of business?

A. Yes sir, that applies to all railroads.

Q. Mr. Dunn would you like the City of New Orleans to grant another railroad the use of your tracks?

A. I can't say that I would.

Q. Which is the better system for each railroad to operate its own tracks or in connection with other railroads?

A. It would be better for a railroad to operate on its own tracks.

Q. And more practicable?

A. Yes sir.

By Mr. RANDOLPH: We concede all that Mr. Gilmore.

401 F. F. HADDIX, who being first duly sworn by the Minute Clerk testified as follows:

Direct examination by Mr. MILLING:

Q. You are an officer or employé of the Louisiana Railway & Navigation Company?

A. Yes sir.

Q. What position do you occupy?

A. Agent.

Q. In the City of New Orleans?

A. Yes sir.

Q. How long have you been connected with this road?

A. About five years and a half.

Q. How long have you been in the railroad business, I mean connected with railroads generally?

A. About twenty four years.

Q. What position have you held with railroads?

A. I have been agent of terminals, clerk, fireman, switchman, brakeman; I have been along the line.

Q. Then you are familiar with the operation of trains, are you?

A. Yes sir.

Q. Well Mr. Haddix you have heard the discussion here with reference to the operation of the trains of the Louisiana Railway & Navigation Company over the Public Belt tracks under this ordinance. Now state whether or not in your judgment it would be practicable for them to do so?

A. Yes it is.

Q. I mean without interference or materially impairing the public service?

A. Yes sir.

402 Q. Have you ever had any connection with the management of railroad yards where a joint agreement had been carried out?

A. Yes sir.

Q. Where was that?

A. In Texas.

Q. How many roads did you manage there?

A. For a time there were three and at another period there were four.

Q. Were you superintendent of the three yards?

A. I was terminal agent in charge of the system.

Q. Was that business conducted satisfactorily, four railroads operating over the same tracks?

A. Yes sir, in one yard there were three and in another the fourth.

Q. They had their own engines and crews?

A. Yes sir.

Q. Were they under one general management?

A. Yes sir, in the terminal.

Q. You are the gentleman I believe who wrote a letter to the Public Belt Commission about the service which has been read here?

A. No sir, I wrote a letter to the Superintendent Mr. Phelps.

Q. Will you please explain under what circumstances that letter was written?

A. Well, the letter was written as a personal matter between Mr. Phelps and myself; in fact he had stated that there had been a good many complaints about the service, and he desired to get something in writing from his friends to show that the service had improved some recently, and I wrote this letter in a spirit and disposition to help Mr. Phelps out personally.

403 Q. It was a fact that the railroad had improved its service?

A. Yes sir.

Q. Had the service been poor before that?

A. Yes sir, it had been very poor.

Q. They had some trouble with the caving of the levees?

A. Yes sir.

Q. And they had a contract to handle a lot of dirt didn't they?

A. Yes, I understand so.

Cross-examination by Mr. GILMORE:

Q. When Mr. Phelps spoke to you about complaints did he not rather speak to you about criticisms that some few members of the Public Belt Commission had made rather than complaints?

A. My recollection is that it was complaints from the people that were having their business handled by the Public Belt and the various railroads including ourselves.

Q. But what you wrote in that letter was of course true and is true?

A. Yes sir, that the service had been improved.

Q. What the letter says is true, isn't it? It is either true or false?

A. I'll say yes; it is not false.

Q. Why did that fourth railroad have to go to another yard in Texas?

404 A. That yard was established before the other railroads existed there.

Q. Were there any other roads there?

A. Only four, three in one yard and one in another yard.

Q. How many roads are in this City?

A. I believe ten or eleven.

Q. Do you think it would be practicable for all of the railroads here to satisfactorily operate in one switching yard?

A. That would depend upon the arrangements of the yards and the regulations that governed the operating, I presume.

Q. And I suppose it would depend largely upon the size of the yard?

A. Yes sir.

ROBERT E. MILLING, Esqr., who being first duly sworn by the Minute Clerk testified as follows:

Direct examination by Mr. RANDOLPH:

Q. Mr. Milling you can give your testimony without any questions.

A. Mr. Godchaux should be called first but in order to prevent any delay I will take the stand. I was not intimately connected with this case until last Summer. I am a member of the firm of Foster, Milling & Godchaux who are attorneys with Mr. Randolph and his firm in the defense of this case. I was not connected with the case

405 until last Summer. Governor Sanders had it in charge first, but he withdrew from the firm on January 1st, 1907, and

Mr. Godchaux then had the matter in charge. Last Summer he went abroad and I took charge of the office here, and also took charge of this case. At the time I took charge of it I found that the Progressive Union had appointed a Committee who were negotiating with a view of trying to bring about a settlement of the differences between the City of New Orleans and Mr. Edenborn on this ordinance. We actually had a meeting in the Mayor's parlor, I think in the early part of August, in which the Committee of the Progressive Union appeared, and there was some discussion which resulted in nothing towards settling the litigation. This conference, however, led to a further conference with Mr. Gilmore, City Attorney, the Mayor and the Public Belt authorities by which a temporary arrangement to go upon the Belt was entered into, the original of which had been introduced in evidence here by Mr. Gilmore. I told Mr. Gilmore, as I remember correctly that there was no chance to compromise the case and I would go ahead and file an answer. I had prepared an answer and filed it before the Court met, and I got an order to file all my exceptions at the same time in order not to delay the case. Court opened in the Fall, and I'll state

that I have been on hand promptly, and that we have used our best efforts to try the case since that time. I want to prove by Mr. Godchaux that during the year 1907 that he himself had made some efforts in the line of compromising this case; in other words that was the policy of our firm and Mr. Edenborn and we followed his instructions, but he didn't want to litigate these things; his idea was that he didn't want a law suit, and that was ours also.

By Mr. RANDOLPH: And even after the suit had commenced to get a peaceful solution?

A. Yes sir, to get a peaceful solution, that was the idea; our object and aim was to avoid a law suit.

By Mr. MILLING: We offer in evidence a map showing the Louisiana Railway & Navigation Company's line of railroad as it exists in the City of New Orleans.

By Mr. GILMORE: We have no objection to that.

By Mr. RANDOLPH: In connection with the testimony of Mr. Edenborn, we offer in evidence map marked R. We also offer in evidence map marked R 1, showing the property of the Pittsburg & Southern Coal Company, known as the Willow Grove landing. We also offer in evidence letter from the Interstate Trust & Banking Company to Mr. Saxton agent of the Louisiana Railway & Navigation Company, acknowledging the receipt of \$50,000 of bonds marked R 2.

By Mr. MILLING: And we also offer in evidence three maps marked M 1, M 2, and M 3, which have been referred to in the course of the testimony.

With the right reserved to take the testimony of Mr. Godchaux out of Court, the defendants close.

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FRIDAY, April 2nd, 1909.

Testimony and Notes of Evidence Taken by Consent, on Friday, April 2nd, 1909, in the Office of Messrs. Foster, Milling & Godchaux, No. — Godchaux Bldg., New Orleans, La., on Behalf of Defendants.

Present:

For Plaintiff: Sam'l L. Gilmore, Esqr., of Counsel.

For Defendants: Mr. Milling, of Foster, Milling and Godchaux, and Mr. Randolph, of Weis, Randolph & Rendell.

EMILE GODCHAUX, who being first duly sworn by Alexis Brian, Notary Public, duly commissioned and qualified, testified as follows:

Direct examination by Mr. MILLING:

Q. Mr. Godchaux, what is your profession?

A. Lawyer.

Q. Are you the Godchaux who is one of the attorneys in this case for the defendants?

A. I am, sir.

Q. Well, this case was filed in June, 1906, and some question has arisen in open trial as to why the case has not been tried earlier than at this time. Please give any explanation you may have as to why this trial has not taken place sooner?

408 A. I might premise that by saying that there were many reasons why the point at issue was not raised, and why the matter in dispute between the parties here was not brought to a head by suit, even before it was brought, in June, 1906. Both prior to the bringing of the suit and since there has been an almost continual attempt made to adjust the differences between the parties. After the suit was brought a similar attempt was made, and I was probably the prime mover in so far as the railroad was concerned, that is, up to last Summer, in trying to adjust the differences. In an effort to adjust these differences since the filing of the suit, I took up the matter with the City authorities on numerous occasions. Mr. Gilmore will remember that he and I had numerous conferences in his office—

By Mr. GILMORE: That was in 1908; the early part of 1908—

A. Numerous conferences in his office between June 1906 and July 1908 upon this subject. I cannot recount how many of these conferences we had, but they were very numerous, and the question of the method of the proposed compromise varied from a proposition to grant the railroad one track to the proposition to grant two tracks, and then to the question of wharf facilities to its property on State street. In the Summer of 1908, about the middle of the Summer of 1908, I went to Europe, and before leaving for Europe I put Mr. Milling in touch with the situation in that respect, and asked him to see what he could do while I was away. Now, what was
409 done during my absence I only know from hearsay.

By Mr. MILLING:

Q. Do you remember whether or not any conference was had during the year 1907?

A. I am satisfied that these conferences began shortly after the suit was filed. I don't say right afterwards because immediately afterwards there was nothing done. I am satisfied there were conferences in 1907; I don't know how many, but immediately after the suit was filed—there was nothing particularly done immediately afterwards, but I am satisfied there were conferences in 1907 and 1908; I know a good many were had up to the time I left here; practically up to the day I left here.

Q. Are you familiar with the location of the right of way of the Belt Reservation or Belt Railroad of the City of New Orleans, as presently located, from actual observation and from maps, etc.?

A. I am familiar with the river front only to a certain extent; I am not an engineer and do not consider myself an engineer or anything, of that kind; my information is gained from observations of the actual conditions there, from maps and from ordinances—the Illinois Central Railroad ordinances under which the Belt tracks were begun.

Q. Then, Mr. Godechaux, what I mean is, from the upper protec-

tion levee down the river towards Henderson Street, at what point do you impinge on the property under the jurisdiction of the Port Commission of the port of New Orleans?

410 By Mr. GILMORE: Objected to on the ground that this is a question of law. The jurisdiction of the Dock Board is to be determined by statute and the construction to be placed thereon is by the Court.

A. I know that the Belt tracks, as originally planned, and as presently laid out do not conflict or lie upon the property claimed by the Board of Port Commissioners until you reach Toledano Street, and I further know that it has never been claimed by the Dock Board that the Belt tracks impinge upon Dock Board property until that point is reached. I further know that the claim made in the Dock Board case against the New Orleans and San Francisco Railroad. * * *

By Mr. GILMORE: That speaks for itself.

A. I further know that in the case of the Dock Board against the New Orleans & San Francisco Railroad the only claim that the Dock Board made was that when the Belt tracks reached Toledano Street they then impinged upon Dock Board property—the property under the jurisdiction of the Dock Board. I might state this: From actual observation and from general knowledge, that the jurisdiction of the Dock Board extends only to the wharves and landings of the Port of New Orleans; that it is apparent from a mere inspection of the Belt tracks above Toledano Street that they do not conflict with the Dock Board's jurisdiction.

411 By Mr. GILMORE: Counsel for the Mayor objects to all this testimony on the ground that it is a mere expression of opinion by the witness and not a statement of facts.

Cross-examination by Mr. GILMORE:

Q. Mr. Godechaux, is it not a fact that between June 26th 1906, when this suit was filed, and the early part of the year 1908, you had no interviews with me?

A. No sir, it is not a fact Mr. Gilmore.

Q. Can you recall the dates of any of the interviews had with me on this matter during the year 1907?

A. No, Mr. Gilmore, I do not think I can. Our interviews were so numerous that it is impossible to remember these dates. There were some times when these interviews were two and three a week and other times when there were no interviews for a month.

Q. Is it not a fact that there were numerous interviews with me in the early part of the year 1908?

A. Yes sir.

Q. Is it not a fact that at the last interview I told you it was a mathematical impossibility for you to demonstrate that your client, the Louisiana Railway & Navigation Company could construct tracks, construct wharves and operate with their own equipment over the Public Belt tracks down to the upper line of Audubon Park and

over the tracks they would build and over the wharves they would build, as cheaply as their business could be handled by the Public Belt railroad and the Dock Board?

412 By Mr. MILLING: We object to going into the details of any interviews in regard to this question of compromise; the whole object of introducing this evidence is to show that the negotiations were had, and what was said at these interviews is not admissible in evidence.

By Mr. GILMORE: I want to refresh his memory as well as show what happened.

By Mr. MILLING: The law specially provides that anything said or done at an interview in attempting to compromise litigation is not admissible in evidence in favor of either party.

By the WITNESS: That question did come up, Mr. Gilmore. I remember distinctly that Mr. Gilmore in these interviews took the position that it was not advisable for the Red River Valley to acquire these rights, for the reason that they could not do it as cheaply as the Belt Railroad could do it for them, and he said he would like me to get that data.

By Mr. GILMORE:

Q. Didn't I tell you it was impossible for you to demonstrate this mathematically, and didn't you tell me you could not do it because you were not an expert, and you would have Mr. Ellerbe do it?

A. I told you that I could not do it and would have to refer that matter to Mr. Ellerbe and other persons who were capable of doing it, and that I would come up to your office with Mr. Ellerbe and we would discuss the question.

413 Q. Is it not a fact that at the interview with Mr. Ellerbe I told him it was absolutely impossible for him to demonstrate mathematically, and in writing, that the Louisiana Railway and Navigation Company could do business cheaper than the Public Belt Railroad system?

A. You did take that position, Mr. Gilmore.

Q. Didn't I tell him that, and didn't he promise to deliver the figures to me in writing in two weeks?

A. I believe there was something of that kind said, Mr. Gilmore,—to furnish you the figures for it and he said he would do it.

Q. In two weeks?

A. I don't remember whether the time was fixed or not; I do know that that conference with Mr. Ellerbe took place before I left here, and I don't know what was the outcome of that proposition.

Q. Don't you know that Mr. Ellerbe never did give me the figures?

A. I don't know that to be a fact at all, Mr. Gilmore because I went to Europe just before that time.

Q. Do you know how much batture is outside of Leake Avenue between Toledano Street and the upper Parish line at any given point?

A. At Napoleon Avenue it is a very large batture,—in front of Napoleon Avenue.

Q. What is it just below Carrollton?

A. At Audubon Park?

Q. Above the Park and below Carrollton?

A. In feet? Not over a hundred feet.

Q. Are you familiar with the resolution adopted by the Board of Port Commissioners appropriating all that portion of the
414 river front between Napoleon Avenue and the upper line of the Parish for public wharf and landing purposes?

A. I have heard of it, Mr. Gilmore, and I understand it only includes the batture, that is, all that portion on the river side of the levee.

By Mr. GILMORE: I offer in evidence a certified copy of the Resolution of the Board of Commissioners of the Port of New Orleans, referred to, and will produce a copy.

By Mr. RANDOLPH: Objected to on the ground that the evidence is closed, except to take the testimony of Mr. Godchaux and Mr. Mooney, and this is an interjection of new evidence.

By the WITNESS: In connection with that ordinance of the Dock Board, I know that the property which the Dock Board seeks to embrace within its jurisdiction is none of it actually occupied by the wharves and landings of the Port of New Orleans, and that the right of the Dock Board to extend its jurisdiction that way is considered a question of grave doubt generally throughout the City.

By Mr. GILMORE:

Q. What are the wharves and landings of the City of New Orleans?

A. You mean with respect to the Dock Board's jurisdiction?

Q. What are the wharves and landings of the City of New Orleans, and what is the Dock Board's jurisdiction?

415 A. I understand the Dock Board succeeded the late Louisiana Improvement Company, which formerly had a lease of all the wharves and landings in the City of New Orleans. Those wharves and landings at that time extended only to Toledano Street and no further up, and as far down as the St. Bernard line, and that the Dock Board was created primarily for the purposes and put under State control for the purpose of including property outside of the Parish of Orleans.

By Mr. GILMORE:

Q. How wide were those wharves and landings?

A. I could not tell you except that I know they varied in different parts. My own judgment is that wharves and landings do not extend on the land side of the levee. That in the City of New Orleans the levees are the Banks of the river.

Q. Now, Mr. Godchaux, your position is, that the Dock Board has no other jurisdiction than that which covered the old wharves?

A. On the contrary, Mr. Gilmore, I think that the object of the creation of the Dock Board was to extend their jurisdiction.

Q. Do you think they have the right to use the wharves between Napoleon Avenue and Carrollton?

A. Yes sir.

Q. Do you think the Dock Board has the right to define and utilize the landings between Napoleon Avenue and Carrollton, on the land side of the wharves?

A. I think they have the right to make and establish landings above Napoleon Avenue and probably above the *the Orleans* line, but I don't think that they can say by resolution or otherwise that a certain thing is a landing when as a matter of fact it is not used as such.

Q. Do you dispute the fact that the Dock Board has the right in the establishment of landings between Napoleon Avenue and Carrollton to mark out and designate how much space is necessary, in its opinion, for such landings?

A. I consider all property on the land side of a levee private property, and that the Dock Board in order to acquire that would have to pay for it.

Q. Do you know of any private property on the land side of the levee between Carrollton and Napoleon Avenue outside, on Toledano Street outside of Leake Avenue?

A. I know the whole City of New Orleans is on that side of the levee.

Q. Do you know of any private property?

A. It is all private property.

Q. Is any of the private property, if there be any, outside of Leake Avenue, between Leake Avenue and the water of the Mississippi, between Toledano Street and Napoleon Avenue, subject to any public servitude? A public servitude for levee purposes? Is there any other?

A. I don't consider it so, no sir. I consider public servitude for other purposes confined to the river side of the levee.

Q. That is your opinion, no matter what the Civil Code might say?

A. That is my opinion; if the Civil Code provides otherwise, I must be wrong.

By Mr. GILMORE: That is all.

417 By Mr. MILLING:

Q. Mr. Godchaux, these tracks of the Belt that run from upper protection levee down the river, at what point do they get on the levee or the wharves or the property claimed by the Dock Board?

A. At Toledano Street.

By Mr. RANDOLPH:

Q. On Toledano Street, up to the protection levee or upper line of Audubon Park, the Belt tracks are laid on lands back of the levees, away from the river?

A. Yes sir.

Q. And suppose behind the levees that you say are private property, you mean in contradistinction to what is considered public property between the levees and the margin of the water?

A. Yes sir.

Q. You don't mean to say that there are no such places as streets or parks behind the levees?

A. No sir.

Q. You are speaking in contradistinction?

A. Yes sir.

Q. And on the principle that lands between the levees and the margin of the water in cities are loci publici?

A. Yes sir.

By Mr. GILMORE:

Q. You don't mean to say that the public has no title on some of the land outside of Leake Avenue and on the inside of the river?

A. I understand you to mean between the Levee and Leake Avenue. The public has no servitude granted by law upon that property. The public may have acquired by purchase or
418 otherwise a right of servitude or right of ownership upon that property; I don't know anything about that.

Q. And for that simple reason, you don't know how much land there is provided?

A. No sir.

NOTE.—Testimony closed. Case continued for argument.

A true and correct report.
(Signed)

A. E. OLIVIERI,
Stenographer.

419 EXHIBIT MARKED "A-1" (Ordinance No. 15080-C. S.).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

419a

A 1.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *March 1, 1899.*

Calendar No. 1855.

No. 15080 Council Series.

An Ordinance.

SECTION 1. Be it ordained by the Council of the City of New Orleans, that Water street, between the upper line of Patterson street and the lower line of Penniston street and the lower width of 110 — feet by the addition thereto of a strip of private property 60 feet wide, to be purchased or expropriated for the purpose as hereinafter pro-

vided, along and abutting upon the river line of said Water street, according to a plan to be prepared by the City Engineer, and to be annexed hereto as part hereof.

SECTION 2. Be it further ordained, That Water street (widened as proposed by this ordinance, be connected with Front street, at or about Upperline street, across Bordeaux, Lyons and Water streets and through private property to be purchased or expropriated for the purpose as hereinafter provided, said connection between Water and Front streets to be 110 feet in width between parallel lines the line nearest the lake to begin at the present lower lake corner of Bordeaux and Water streets, and to end at or about the present lower lake corner of Upperline and Front streets, according to a plan to be prepared by the City Engineer, and to be annexed to this ordinance as part hereof.

SECTION 3. Be it further ordained, etc., That Front street, from the present upper line of Upperline street, to the lower line of Valmont street, be widened from its present width of 50 feet, to a width of 110 feet, by the addition thereto of a strip of private property 60 feet in width to be purchased or expropriated for the purpose as hereinafter provided, along and abutting upon the river line of said Front street, according to a plan to be prepared by the City Engineer and to be annexed hereto as part hereof.

419b SECTION 4. Be it further ordained, etc., That Front street, between the upper line of Valmont street and the lower line of Joseph street be widened from the present width of 50 feet to a width of 110 feet by the addition thereto of a strip of private property 60 feet in width, to be purchased or expropriated as hereinafter provided, along and abutting upon the lake line of said Front street, according to a plan to be prepared by the City Engineer and annexed hereto as part hereof.

SECTION 5. Be it further ordained, etc., That the Board of Commissioners of the Orleans Levee District be requested to remove the present levee, commencing at a point at or about Joseph street, and ending at or about the upper line of Audubon Park, and to construct a new levee as near the river as in the judgment of the Board of Commissioners of the Orleans Levee District, approved by the Board of Engineers of the State of Louisiana, may be safe and proper. Said new levee to connect, at the lower end, with the present levee at or about Joseph street, and at its upper end, with the present levee at or about the upper line of Audubon Park, the proposed new levee to be constructed by the Board of Commissioners of the Orleans Levee District with funds to be furnished to said Board as hereinafter provided, it being, however, understood that no claim shall be made against the City of New Orleans for any property taken for the purpose of constructing said levee.

SECTION 6. Be it further ordained, etc., That a new street 110 feet in width, to begin at the lower corner of Front street (widened as proposed by this ordinance) and Joseph street, and to extend to the upper line of Audubon Park, be opened across intervening streets and through private property to be purchased or expropriated for the purpose as hereinafter provided, along the river, on a line as

nearly parallel as practicable to the new levee, between Joseph street and the upper line of Audubon Park, petitioned and provided for in this ordinance, the river line of said new street, however, to be not less than 60 feet from the inner toe of said proposed new levee, the

said new street to connect with an extension thereof as hereinafter provided, according to a plan to be prepared by the City Engineer and to be annexed hereto as part hereof.

SECTION 7. Be it further ordained, etc., That an extension of the new street provided for in this ordinance, said extension to begin at a point at or about the upper line of Audubon Park, where it shall connect with said new street and extend to the upper line of Hillary street and to be 110 feet in width, be opened across intervening streets and through private property to be purchased or expropriated for the purpose as hereinafter provided; along the river on a line as nearly parallel as practicable to the present levee, the river line of said extension, however to be never less than 60 feet from the inner toe of the present levee, according to a plan to be prepared by the City Engineer and to be annexed hereto as part hereof.

SECTION 8. Be it further ordained, etc., That a further extension of the new street, provided for in this ordinance, said further extension to begin at the upper line of Hillary street, where it shall connect with the extension of said proposed new street provided for in this ordinance, to extend to the upper line of the Parish of Orleans and to be 110 feet in width, be opened across intervening streets and through private property to be purchased or expropriated for the purpose, as hereinafter provided for, along lines as nearly identical as practicable with those of the extension of said new street provided for in the preceding section of this ordinance, and on lines as nearly straight as practicable, the river line of said further extension to be never less than sixty feet from the inner toe of the levee, according to a plan to be prepared by the City Engineer and to be annexed hereto as part hereof.

SECTION 9. Be it further ordained, etc., That upon the terms and conditions hereinafter set forth and provided in this ordinance, the Chicago, St. Louis and New Orleans Railroad Company, its lessees, successors and assigns, be and it is hereby authorized and empowered to locate, construct, maintain, freely use and operate, as part of its railroad and railroad system, two main railroad tracks from the lower line of Penniston street, along Water street to the lower line of Bordeaux street, along the connection of Water street with Front street, between Bordeaux and Upperline streets, provided for by this ordinance, into Front street, along Front street to the lower side of Joseph street, along the new street provided for by this ordinance, from the lower line of Joseph street to the upper line of Audubon Park, along the extensions of said new street, provided for by this ordinance, from the upper line of Audubon Park to the upper line of the Parish of Orleans and over and across all intervening streets, alleys and public places; and also such connecting tracks, cross-overs, spurs and switches, as may from time to time be necessary to connect each of said main railroad tracks with the other, and with the Stuyvesant Docks on the Mississippi river in the City of New

Orleans or any private property which said railroad, its lessees, successors or assigns may hereafter acquire between Penniston street and Napoleon avenue, the said two main railroad tracks to be located on the inner or lake side of the two public railroad tracks provided for by this ordinance, and on the inner or lake side of the neutral ground provided for by this ordinance, and shall be located according to lines and grades to be established by the City Engineer and according to a plan to be prepared by the City Engineer and to be annexed hereto as part hereof.

SECTION 10. Be it further ordained, etc., That the Chicago, St. Louis & New Orleans Railroad Company, its lessees, successors and assigns, shall be and it is hereby authorized and empowered to locate, construct, maintain, freely use and operate the two main railroad tracks provided for by this ordinance, which are, for convenience, designated by this ordinance as tracks Nos. 1 and 2, upon and only upon the following terms and conditions: First. The City of New Orleans shall acquire by purchase or expropriation, according to law, all private property needed for the widening or opening of any street to be widened or opened as provided for by this ordinance, and said private property, when so acquired, shall be and remain perpetually dedicated to public use for street uses and purposes as provided for by this ordinance. All of said property shall be acquired by the City of New Orleans, by expropriation, according to law, except such as may be acquired or purchased by the City of New Orleans, with the consent and approval of said railroad company, or by said 419c railroad company, to be dedicated in all cases as herein provided for, and the cost of all private property purchased or expropriated by the city shall be paid by the said railroad company to the owners thereof, at the dates when the city acquires title for the public, to the same.

Second. That the funds required for the removal of the levee from its present line, to a line nearer the river as provided for by this ordinance, shall be paid over by said railroad company to the Board of Commissioners of the Orleans Levee District at such times and in such amounts as the Board may require.

Third. That said railroad shall locate and construct from the upper line of Audubon Park to the upper line of the Parish of Orleans, along the extensions of the new street provided for by this ordinance, and on the outer or river side of the two tracks provided for by this ordinance, for the Chicago, St. Louis and New Orleans Railroad Company, its lessees, successors, and assigns, two railroad tracks similar in all respects and constructed in the same manner as the tracks provided for by this ordinance for said Chicago, St. Louis and New Orleans Railroad Company, with such connecting tracks, cross-overs, spurs and switches to connect each of said tracks with the other, as may be designated by the City Engineer at the time of the construction of said two tracks, and the said railroad company shall dedicate said two railroad tracks, connecting tracks, spurs and switches in full ownership and complete title to the City of New Orleans for perpetual public use, said tracks being for convenience, designated by this ordinance as tracks Nos. 3 and 4, and

shall be constructed according to lines and grades to be established by the City Engineer. The center line of track No. 3 shall be 13 feet from the center line of track No. 2, and the center line of track No. 4 shall be 26 feet from the center line of track No. 2, according to a plan to be prepared by the City Engineer and to be annexed hereto as part hereof.

SECTION 11. Be it further ordained, etc., That the payment by the said railroad company of the purchase price or cost of expropriation of all private property acquired by the City of New Orleans for the purpose of widening, connecting or opening streets to the owners thereof, at the dates when the city shall acquire title to the same, the dedication as herein provided for by said railroad company of property acquired by it for street purposes as provided for by this ordinance, the payment by said railroad company to the Board of Commissioners of the Orleans Levee District in such sums and at such times as said board may require of all funds needed for the removal of the present levee, and for the construction of the proposed new levee and its connections with the present levee, as provided for by this ordinance, and the location and construction by said railroad company of the two railroad tracks, connecting tracks, cross-overs, spurs and switches to be dedicated to the city for perpetual public use, as provided for by this ordinance, shall be and they are hereby declared to be, by the Council of the City of New Orleans, and shall be acknowledged and accepted by said railroad company as conditions precedent to be fully and completely complied with and performance by said railroad company before the grant to said railroad company to locate, construct, maintain, freely use and operate the main railroad tracks connecting tracks, cross-overs, spurs and switches provided for by this ordinance for said railroad company shall have legal force and effect. That whenever the Chicago, St. Louis and New Orleans Railroad Company, its lessees, successors or assigns shall have fully and completely complied with and performed the conditions specified in this section, they shall be entitled to receive from the Mayor of the City of New Orleans, over his official signature and seal, a certificate to that effect, and such certificate, when approved by the Council, shall be full proof of the fact that said Chicago, St. Louis and New Orleans Railroad Company, its lessees, successors or assigns, have fully and completely complied with and performed all of said conditions.

SECTION 12. Be it further ordained, etc., That all of the railroad tracks, connecting tracks, cross-overs, spurs and switches to be laid in streets and public places as provided for by this ordinance, shall be constructed on lines and grades to be established by the City Engineer. There shall be established in the 110 foot street, provided for by this ordinance, a neutral ground 50 feet in width, according to a plan to be prepared by the City Engineer, which said neutral ground shall be occupied by the railroad tracks provided for by this ordinance, and which said neutral ground shall be curbed and grade- by said railroad company, the grades to be established by the City Engineer. Said railroad company shall maintain, so as not to obstruct drainage, and keep in good order,

between Penniston street, and the upper line of Audubon Park, the entire neutral ground provided for by this ordinance, provided that said railroad company shall only maintain that portion of said neutral ground between said limits, which is not occupied by the railroad tracks provided for said railroad by this ordinance, and designated as tracks Nos. 1 and 2 only as long as said portion of said neutral ground is unoccupied by railroad tracks of other railroads, or public railroad tracks, and there after shall be bound to maintain only that half of said neutral ground upon which the tracks provided for said railroad company by this ordinance are laid, said railroad company shall maintain so as not to obstruct drainage, and keep in good order, between the upper line of Audubon Park and the upper line of the Parish of Orleans the entire width of the neutral ground provided for by this ordinance, provided that said railroad company shall be bound to maintain that portion of the neutral ground which is occupied by the public tracks provided for by this ordinance, only as long as said public tracks are not used by other railroad companies, or by the public, and thereafter shall be obliged to maintain only that half of said neutral ground upon which the tracks provided by this ordinance for said railroad company, are laid. All intersections of streets shall be planked or at the discretion of said railroad company, paved with material equally good, or better, in the opinion of the City Engineer, between the tracks, between the rails, and a sufficient distance on each side of the tracks to provide a safe and easy approach to and a crossing over said tracks, said planking or other pavement to be on lines and levels to be established by the City Engineer, and all construction work of every character to be done subject to the approval of the City Engineer. That all construction work shall be commenced within six months from the date of the acceptance of this ordinance, as hereinafter provided, by the Chicago, St. Louis & New Orleans Railroad Company, its lessees, successors and assigns and shall be completed within eighteen months after said date, and that until said tracks and other construction work is finally completed, the grant of track privileges made by this ordinance to said Chicago, St. Louis & New Orleans Railroad Company, its lessees, successors and assigns shall have no legal force or effect, any delay resulting from legal proceedings to be deducted from the time fixed by this ordinance for the beginning and completing of construction work.

SECTION 13. Be it further ordained, etc., That the said railroad company, its lessees, successors and assigns shall not discriminate at any time, illegally or unjustly against the City of New Orleans.

SECTION 14. Be it further ordained, etc., That said railroad company, its lessees, successors and assigns shall be bound to switch or belt without unreasonable delay over said tracks Nos. 1 and 2, and over all other tracks laid in the public streets or public places, along the river front, now operated or which may be hereafter operated, owned, controlled or leased by said railroad company, its lessees, successors and assigns except into the private property or terminals of said railroad company, its lessees, successors and assigns for a reasonable compensation not to exceed a maximum charge of \$1.50

per car, their own cars, and the cars of any other railroad company, now operating or which may hereafter operate a line of railroad within the City of New Orleans, also cars belonging to individuals; when such service shall be requested, and no other unjust discrimination shall be made between different companies or individuals entitled to and requesting such service; provided, that said railroad company, its lessees, successors and assigns shall not be obliged to switch cars or other railroad companies for a less sum than other railroad companies charge for a similar service, until such time as other railroad companies operating in the City of New Orleans agree with the City of New Orleans upon a fixed switching or belting charge.

SECTION 15. Be it further ordained, etc., That the main railroad tracks of said companies, provided for by this ordinance, may be used for freight and passenger cars and trains drawn by steam engines or other motive power, at the discretion of the said railroad company, its lessees, successors and assigns.

SECTION 16. Be it further ordained, etc., That the use in 419i this ordinance, of the words "Expropriation or purchase" shall not be interpreted or construed so as to prevent the acquisition by the City of New Orleans or the Chicago, St. Louis and New Orleans Railroad Company, its lessees, successors or assigns, of property for levee or street purposes by modes other than expropriation or purchase.

SECTION 17. Be it further ordained, etc., That all ordinances or parts of ordinances in conflict with the provisions of this ordinance be, and the same are hereby repealed.

SECTION 18. Be it further ordained, etc., That this ordinance shall take effect only after it has been, in its entirety, accepted by the Chicago, St. Louis & New Orleans Railroad Company, its lessees, successors and assigns, by notarial act before the City Notary, and that if said acceptance by said railroad company of this ordinance is not made within 60 days from the promulgation of this ordinance — shall become, in all its parts, null, void and of no effect.

Adopted by the Council of the City of New Orleans, February 28, 1899.

W. R. BRASHEAR,
Clerk of Council.

Approved March 1st, 1899.

W. C. FLOWER, *Mayor.*

A True copy:
R. L. TULLIS,
Secretary to the Mayor.

N. O., M'ch 23/09.

A true copy.
[SEAL.] (Signed)

W. P. BALL,
Sec'y to Mayor.

[Endorsed:] A 1. No. 79,743. Div. C. Martin Behrman vs. La. R. & N. Co. Offered in Evidence by Plaintiff. Filed April 19th 1909. (Signed) Joe Garidel, d'y cl'k.

420 EXHIBIT MARKED "A-2" (ORDINANCE No. 1615, N. C. S.).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

(In pencil:) Frisco Ord.

420a

A-2.

MAYORALTY OF NEW ORLEANS,
CITY HALL, Feb. 10th, 1903.

Calendar No. 2121.

No. 1615, New Council Series.

An Ordinance Granting Right of Way and Depot and Other Rights and Privileges to the New Orleans and San Francisco Railroad Company.

SECTION 1. Be it ordained by the Council of the City of New Orleans, That the New Orleans and San Francisco Railroad Company, a corporation organized under the laws of the State of Louisiana, and domiciled in the City of New Orleans, its successors and assigns, is hereby granted the right to enter the City of New Orleans, and to construct, maintain and operate with steam or electric power, its lines of railway tracks along, across and over the streets, highways and public places hereinafter mentioned, and to acquire for railway purposes by expropriation or otherwise, all property in the City of New Orleans needed for railway purposes, such as tracks, spurs, side-tracks, yards, water tanks, shops, platforms, sheds, warehouses, roundhouses, coal shutes, loading bins, depots and other appropriate purposes, and particularly the property hereinafter designated.

SECTION 2. Be it further Ordained, etc., That said company, its successors and assigns, is hereby granted the following rights of way in and through the City of New Orleans, to-wit:

1st. Over the route, line and right of way now occupied by the New Orleans Belt & Terminal Company, from the upper boundary of the City of New Orleans to the intersection of said line with the line now claimed and occupied by the New Orleans, Spanish Fort and Lake Railroad Company. It shall have the right to use the tracks and right of way of said New Orleans Belt & Terminal Company along and over the route aforesaid under such agreement as the companies may make between themselves; and under a similar agreement it shall have the right to construct additional tracks

along and over the route aforesaid. Both said New Orleans and San Francisco Railroad Company and the said New Orleans Belt & Terminal Company, shall have the right to lower the trestle and bridge across the New Canal and Shell Road to grade; provided, however, that both of said companies shall, at their own cost and expense, maintain and operate gates across the tracks of the New Orleans City Railroad and across the Shell Road.

2nd. From some convenient point on the line of the New Orleans Belt & Terminal right of way, with two or more main tracks, and such side tracks and turn outs as may, from time to time, be necessary, with a proper curve into St. Louis Avenue, and down St. Louis Avenue to its junction with the proposed extension of St. Louis Street. If St. Louis Avenue, as figured in the City map, has never been opened, or dedicated to public use, the said company shall have the right to acquire by expropriation, or otherwise, a right of way of such width as from time to time may be necessary along the indicated route of St. Louis Avenue from the New Metairie Road to the line of the Belt & Terminal Company, and such other property as may be necessary and convenient to make proper curves from said line into the line of the Belt & Terminal Company.

3rd. From some convenient point on the line of the New Orleans Belt & Terminal Company's right of way, adjacent to the bridge over the New Canal with two or more main tracks and such side tracks and turn-outs as may, from time to time, be necessary, toward the junction of St. Louis Avenue, or the acquired right of way on the indicated site thereof, and the proposed extension of St. Louis street. This right of way shall be acquired by expropriation or otherwise and shall be of such width as may, from time to time, be necessary and convenient. The damage to be paid by said company for said right of way through squares 656 and 657, the property of the City of New Orleans, shall be fixed by agreement between the Council and said company, or by amicable suit if they cannot agree.

4th. From the junction of the two rights of way mentioned in paragraphs two and three, and connecting with the tracks thereon laid, with two or more main tracks and such side tracks and turn-outs as may, from time to time, be necessary, *the* the proposed extension of St. Louis street to St. Louis street, as now opened, along St. Louis street to Bernadotte street, thence across the square bounded by St. Louis, Conti, Bernadotte and St. Patrick street- to Conti street, thence up Conti street to Hagan avenue, thence across Hagan avenue, and the drainage canals to Carondelet Walk, on the west side of the Carondelet Canal, thence down said Carondelet Walk to the Basin. All bridges over the drainage canals shall be constructed and maintained to the satisfaction of the Drainage Commission, or its successors; and the plans and specifications of the bridges and structures necessary to cross the out-fall basin at the corner of Broad street and Carondelet Walk shall also be approved by said Commission or its successors.

5th. A single track in and along the west side of St. Louis street from Bernadotte street to Hagan Avenue.

6th. As many tracks as they may, from time to time, choose to

lay between Bernadotte street and Hagan Avenue, through the double line of squares bounded by Bernadotte, Bienville, Hagan Avenue and St. Louis street and across all the intervening streets between said squares, with switches and turn-outs from the track in St. Louis street and the tracks in Conti street into said squares.

7th. As many tracks as they may, from time to time, choose to lay, and as their business and wants may require through the triangle of squares bounded by North Dorgenois, St. Louis, Carondelet Walk and Basin Street, and across all intervening streets, from North Dorgenois to Basin street, provided, that North Rocheblave and North Dorgenois streets from St. Louis street to Carondelet Canal shall remain open for traffic.

8th. A double track in Toulouse street from Basin street to Carondelet Walk.

9th. By proper curves from the line of squares mentioned in paragraph seventh, into the neutral ground of Basin street, and thence up said neutral ground to Canal street, with as many tracks as may be necessary to make said neutral ground available for the passenger depot hereafter referred to.

10th. Over the double track belt line and reservation on the river front of the City of New Orleans from the upper limits 420d of the City of New Orleans to Henderson street, upon the following terms and conditions.

(a) That said Company shall, at its own cost and expense, construct and dedicate to perpetual public use, the double track as now projected from the end of the rails on the upper side of Audubon Park to Henderson street, with all necessary and convenient cross overs, switches and spur tracks, such construction to be completed before July 1st, 1904, under the direction of the public belt authorities of the City of New Orleans. Said Company shall keep an accurate account of said cost of construction as herein provided and shall present said account with proper vouchers to the said public belt authorities, who shall audit the same for the purpose of determining the aggregate amount expended under this clause of this paragraph, of this ordinance.

(b) That the City shall furnish a clear legal right of way for the construction of said tracks, but said Company shall pay the cost and expense of removing any tracks or structures that may physically obstruct said legal right of way, and any expropriation expenses not to exceed twenty thousand dollars (\$20,000.00).

(c) That the legal title to the whole of said belt tracks, switches, spurs, sidings, etc., constructed and to be constructed, shall be in the City of New Orleans, and the City shall be the sole owner of all of said tracks and their appurtenances at all times, and under all circumstances.

(d) That said tracks shall, upon the completion of the city's belt system to Clouet street, be under the sole and exclusive control and management of the public belt authorities of the City of New Orleans.

In order to provide for the completion of said belt system to Clouet street and its further continuation or construction, said public

belt authorities shall have the right and power to grant the right of use of said tracks to any railroad now in, or that may hereafter come into the City of New Orleans, exacting as a condition of said grant from each of said railroads, to which said right of use is granted, a sum equal to the amount expended as aforesaid by the

420c New Orleans and San Francisco Railroad Company for construction of said belt tracks to Henderson street. All sums

so paid to said public belt authorities, in consideration of such grants, shall be deposited with the fiscal agent of the City of New Orleans, to the credit of a special fund, and said fund shall not be used for any other purpose than the construction of the belt tracks, switches, side tracks, spurs and turn-outs, as part of the public belt system of the City of New Orleans, and the payment of the costs of right of way for such belt system. The New Orleans and San Francisco Railroad Company and every other company which shall contribute as aforesaid to the completion of the belt system shall have the right to use said completed belt, said use being always under the management and control of the "Public Belt Authority;" and for such use each company shall pay its share on a wheelage basis of the cost of maintenance and of those expenses of operation and management usual and proper in such cases.

(e) The New Orleans and San Francisco Railroad Company, and all other contributing railroads using the belt line, shall have the right to operate their own locomotives, cars and equipment over the said public belt under the control of the "Public Belt Authority," provided that all railroads using said tracks shall belt all cars to and from their respective lines over all switches, spurs and sidings forming part of the public belt tracks, free of all cost.

Unless otherwise ordered by the "Public Belt Authority," or until said "Public Belt Authority" is operating its own equipment over said system, completed to Clouet street, the New Orleans and San Francisco Railroad Company, agrees to belt cars belonging to connecting railroads or to individual firms or corporations over the belt line, and over all switches, spurs and sidings connected therewith and forming part thereof without discrimination, treating and handling such belted cars as justly and as equitably as if they were its own cars coming off its own lines, charging for such service, not exceeding \$2.00 per car, for placing a car and returning same empty, or vice versa; provided, however, that a similar obligation shall be hereafter placed on every contributing railroad hereafter admitted

420f to the use of said belt tracks, and provided, further, that said New Orleans and San Francisco Railroad Company shall not, under this clause, or under any other clause of this ordinance, be obligated to belt cars for any railroad company not now operating a line in the City of New Orleans, unless such other railroad shall become a contributor as herein provided to the belt road construction fund.

(f) That all controversies between the said New Orleans and San Francisco Railroad Company, on the one side, and the city, or her public belt officials, or any other company or companies to which the city or her Public Belt Authority may grant the use of said tracks

and appurtenances on the other side, relative to the use of said tracks and appurtenances or to the cost of construction or maintenance thereof, or to the rules and regulations relative to the movement and handling of cars, trains and traffic thereon and thereover, shall be submitted to the arbitration of three disinterested persons, one to be selected by said New Orleans and San Francisco Railroad Company, the second by the city, or her Public Belt officials, or such other company or companies, as the case may be, and the third by the two thus chosen, and the decision of this tribunal, or of any two of them, shall have the effect of an amicable composition.

(g) That all damages to life and property caused by the fault or negligence of the officers or employees of any company, while operating over said tracks, shall be borne exclusively by said company, and the city shall in no respect be responsible therefor.

(h) That the New Orleans and San Francisco Railroad Company, its lessees, successors and assigns, shall not discriminate at any time, illegally or unjustly, against the City of New Orleans.

(i) That the said railroad company, its lessees, successors and assigns, shall be bound to switch or belt, without unreasonable delay, over its main tracks within the limits of the City of New Orleans, and over all other tracks laid in the public streets or public places within said city limits, owned, controlled or leased by said railroad company, its lessees, successors or assigns, except into the private property or terminals of said railroad company, that is, depots, 420g warehouses, elevators, and other like terminals, owned or operated by the railroad company, its lessees, successors or assigns, for a reasonable compensation, not to exceed the maximum charge of \$2.00 per car, their own cars and the cars of any other railroad company now operating, or which may hereafter operate, a line of railroad within the City of New Orleans, also cars belonging to individuals, firms or corporations, when such service shall be requested, and no unjust discrimination shall be made between different companies or individuals entitled to and requesting such service; provided, that said railroad company, its lessees, successors and assigns shall not be obliged to switch cars for other railroad companies for a less sum than other railroad companies charge for a similar service until such time as other railroad companies operating in the City of New Orleans agree with the City of New Orleans upon a fixed switching or belting charge; nor shall it be obliged to perform such service on its main tracks for any railroad that refuses to perform the same service for it at the same charges and under the same conditions. All cars coming to the city over the lines of the New Orleans and San Francisco Railroad Company shall be delivered to points on their tracks free of belting charges.

(j) That the movement of trains, cars and traffic on and over said tracks from the upper limits of the city to Henderson street until the city completes her belt system to Clouet street and begins to operate them as part of said system, shall be under the direction, control and management of said company, and when the city shall begin to operate said tracks as part of her completed belt system,

the movement of trains, cars and traffic on and over said tracks shall be under the sole direction, control and management of the Public Belt Authority of the City of New Orleans, provided always, that there shall be no discrimination against the cars, trains and traffic of said company, or of any other company granted as above provided the right to use said tracks. Until the city begins to operate said tracks as part of her completed belt system, the whole cost of maintenance shall be borne by the New Orleans and San Francisco Railroad Company, unless during this period the Public Belt

420h Authority shall grant to other railroads a right of operation over said tracks similar to that herein granted to said company, in which event the cost of maintenance and the usual and proper parts of the cost of operation and management shall be borne on a wheelage basis by all companies operating over said tracks? If, however, the belt is not completed to Clouet street by July 1st, 1907, the sole control and management of said belt tracks shall revert to the Public Belt Authorities of the City of New Orleans, July 1st, 1907.

SECTION 3. Be it further Ordained, etc., That said company, its successors and assigns, shall have the right to acquire by purchase or expropriation the thirty squares of ground lying between Bernadotte, Bienville, Hagan Avenue and St. Louis streets, being all the squares bounding Conti street on each side from Bernadotte street to Hagan Avenue, and the nineteen squares of ground lying in the triangle bounded by North Dorgenois, St. Louis, Carondelet Walk and Basin street, being Squares Nos. 327, 308, 299, 280, 271, 250, 241, 221, 212, 192, 183, 162, 163, 152, 153, 132, 133, 119 and the unnumbered triangle bounded by Villere, Carondelet Walk and Toulouse street, and upon the said property so acquired to construct, establish and maintain all facilities of every kind and nature necessary, appropriate and convenient to the terminal of a great railway system, such as car yards, car sheds, shops, round-houses, coal yards, bins and chutes, freight sheds and warehouses, loading and unloading platforms, car and freight scales, passenger and freight depots and their appurtenances; and to this end and for these purposes, when all of the property afore-said is acquired to close the following streets: Olympia street, from St. Louis to Bienville; and David street from St. Louis to Bienville; Pierce, Scott, Telemachus, Genois and Clerk streets, from St. Louis to Bienville street; North Tonti, North Miro, North Johnson, North Roman, and North Derbigny streets from St. Louis street to Carondelet Walk; North Robertson and North Liberty, or Tremé street, from St. Louis to Carondelet Walk; North Franklin, between Square 119 and Square 132; Toulouse street from Basin to Marais street; Toulouse street from Marais to

420i Villere, and Toulouse Street from Villere to Robertson street; provided, that St. Patrick, Murat, Alexander, Solomon, Carrollton avenue, Cortez and Hagan Avenue shall remain open.

The Company shall at its own expense, maintain and operate gates, at Villere, Claiborne, Broad, Marias, Galvez and Alexander Streets, Hagan Avenue and at Metairie Road. If the company at any time establish a general shop on its line between New Orleans

and Memphis, Tennessee, such general shop shall be located and established in the City of New Orleans.

SECTION 4. Be it further Ordained, etc., That nothing herein contained shall be construed as restricting the said company to the squares of ground herein mentioned for railroad and terminal purposes, but it shall have the right, from time to time, to extend its terminal area, and to acquire as many squares of ground adjacent to the squares and route herein specified as its business may require, and to connect said property by tracks and switches to the routes and property herein set forth, and for that purpose to extend its switches and tracks along and across intervening streets to reach all such additional property acquired for terminal purposes. It shall further have the right to construct switches and side tracks into industries that may be, from time to time, established adjacent to its routes, and terminal properties, and to cross and use the intervening streets for such tracks.

Nothing in this section, or in this Ordinance, shall be construed so as to permit said company (except with the special consent of the Council) to cross Canal street with its tracks and switches, or to construct any switches or spur tracks into any property on either side of Basin street from Canal to St. Louis street, or to cross Bienville street at any point, except at Basin street, or to lay any tracks or switches along Claiborne street, Villere Street, Marias street, North Prieur street, Galvez street, Broad street, Hagan avenue, Cortez street, Carrollton avenue, Solomon street, St. Patrick street, Murat street, or Alexander street, even for the purpose of reaching adjacent property." The words "adjacent squares," or "adjacent property,"

in this section, shall be construed to mean only such squares
420j of property as are separated from the property or routes of said company by the width of a single intervening street.

SECTION 5. Be it further Ordained, etc., That said company, its successors and assigns, shall have the right to construct, maintain and operate a passenger depot on the neutral ground of Basin street, from Canal to the west side of Bienville street, and to that end the neutral ground shall be widened six feet on each side from Canal street to the Basin, and the roadway across the neutral ground of Basin, opposite the entrance of Customhouse street, shall be closed with gates or doors, which shall be kept open at all times except when trains are entering or departing from said depot or when trains are standing on said tracks.

This grant is made upon the following conditions:

(a) That a handsome structure shall be constructed for said depot, to cost, with its appurtenances, not less than \$125,000.00, the plan of which shall be approved by the City Council.

(b) That said company shall hold the city harmless for the claims of all other corporations who may assert rights on said neutral ground.

(c) That the whole cost of widening said neutral ground six feet on each side and the removal and the rebuilding of all tracks for that purpose, shall be at the sole cost of the grantee.

(d) That said depot and tracks over the neutral ground of Basin

street shall be constructed and operated in such a manner as not to injure the drainage canal under said neutral ground.

(e) That nothing but passengers, baggage, mail and express matter shall ever be handled in or out of said depot, or over the neutral ground of Basin street.

(f) That said Company shall have the right to permit other railroad companies to use its tracks approaching Basin street to reach said depot for passenger, mail, express and baggage purposes only, on such terms and conditions as the said Company and the using Company may agree upon, and it shall permit other railroads to use the approaching tracks on Basin street and the said depot for passenger, mail, express and baggage purposes only, upon the usual terms fixed for the use of Union Depots, and such depot, with its approaching tracks on Basin street shall be a Union depot for the use, on the above conditions, of all railroads now in, or that may hereafter come into the City of New Orleans.

SECTION 6. Be it further Ordained, etc., That with the permission of the Carondelet Canal and Navigation Company, said company shall have the right to lay switches and side tracks along the banks of said canal for the purposes of the interchange of traffic between the Canal and the said company.

SECTION 7. Be it further Ordained, etc., That said company shall have the right and privilege to set up telegraph and telephone poles along the rights of way and tracks herein granted, and to string wires over, across and along the public highways aforesaid, such poles and wires, however, not to impede or obstruct unnecessarily the use of such public highways.

The erection of all poles, posts, wires or electrical conductors, shall be under the supervision of the Commission of Police and Public Buildings and City Electrician, and further they shall be erected in accordance with ordinances No. 13,838, C. S., 13,970, C. S., and all ordinances amendatory thereto.

SECTION 8. Be it further Ordained, etc., That all of the above tracks laid along and across the public highways shall be laid along lines and grades to be approved by the City Engineer, and shall be so laid and maintained as not to interfere with or obstruct the drainage of the city or the reasonable use of the said streets. Cars shall not be parked on tracks constructed along the highways aforesaid, nor shall they stand or be parked so as to obstruct any open cross street.

The right is reserved to the Sewerage and Water Board, or the Drainage Commission, or their successors, to construct and operate any of their works along the present line of streets, now open, the property of the city, and which may be closed by this ordinance; and no structure shall be built by said company conflicting in any way with the present, or proposed system of sewerage, drainage or water works, until a plan of the same has been approved by the Drainage Commission or Sewerage and Water Board, or their successors, through the properly authorized officer of such board or boards. Such approval of plans, however, shall not operate in any way to relieve the said New Orleans and San Fran-

cisco Railroad Company from responsibility for any damage which may be caused to the works of the said boards by the construction or operation of their system.

SECTION 9. Be it further Ordained, etc., That all streets through and across which the tracks of said company are laid shall be kept in good order and condition between the rails and two feet on each side thereof. All pavements taken up in the laying of such tracks shall be relaid at the company's cost to the satisfaction of the Engineer and the commissioner of Public Works, and shall be thereafter maintained between tracks and for two feet on each side thereof. On all streets not now paved, which may hereafter be paved by the city, the said company shall pay the cost of paving between the rails and two feet on each side thereof, and the same rule shall apply to the renewal of pavements on streets now paved.

SECTION 10. Be it further Ordained, etc., That between Broad street and Basin street, and Basin street and Canal street, the speed of the trains of said company shall not exceed ten miles per hour: between Broad street and Metairie Road it shall not exceed twenty miles an hour, and beyond the Metairie Road they shall be no restriction on speed of trains.

SECTION 11. Be it further Ordained, etc., That in part consideration for the grants herein contained said company shall pay to the City of New Orleans all sums necessary to be disbursed by the city to the owners of property to be taken by the city for the opening of St. Louis street, from Metairie Road to New Metairie Road.

SECTION 12. Be it further Ordained, etc., That said company shall begin construction work within the City of New Orleans, within six months from the acceptance of this ordinance.

SECTION 13. Be it further Ordained, etc., That said company shall at its own expense, fill with suitable material the old drainage canal from Claiborne street to Broad street.

420m SECTION 14. Be it further Ordained, etc., That all grants and privileges herein given are made for the period of the charter of said company, its successors and assigns.

SECTION 15. Be it further Ordained, etc., That nothing in this ordinance shall be construed as a restriction upon the lawful and reasonable exercise of the police power of the City of New Orleans over the said company and its operations within the limits of the City of New Orleans.

SECTION 16. Be it further Ordained, etc., That the New Orleans and San Francisco Railroad Company shall, as part consideration for this grant, present to the Council, within thirty days from the date of its acceptance of this ordinance:

First. A resolution of the directory of the New Orleans, Spanish Fort and Lake Railroad Company, consenting that its franchises from the City of New Orleans shall expire as of the date of such resolution.

Second. Certified copies of the orders dismissing, at the cost of said New Orleans, Spanish Fort & Lake Railroad Company, all pending suits, both in the State and Federal Courts, relative to such franchises, or the ordinances affecting the same.

Third. A resolution of the directory of the New Orleans, Belt & Terminal Company, the successor by purchase of the rights and franchises of the New Orleans and Western Railroad Company, renouncing all claims to the franchises granted to the East Louisiana Railroad Company by Ordinance 6139, C. S., approved March 15, 1892, said renunciation to have full force and effect as soon as the main tracks of the New Orleans and San Francisco Railroad Company are completed and ready for operation from the junction of their line with the line of the said Belt & Terminal Company to Basin Street, and in all events, said renunciation to have full force and effect on July 1, 1904.

Fourth. Certified copy of the order dismissing the suit now pending in the United States Circuit Court between the East Louisiana Railroad Company and the New Orleans and Western Railway Company, relative to the franchises granted under said Ordinance No. 6139, C. S., and the ordinances affecting and relative to the same.

420n. The said New Orleans and San Francisco Railroad Company shall be further bound and obligated by its acceptance of this ordinance, and as part consideration therefor, to guarantee the taking up and removal from Bienville Street and Bienville Avenue, all tracks laid in all parts of said street, and the payment to the City of five thousand dollars to be expended in the improvement of Bienville Avenue. Such tracks shall be removed and said five thousand dollars paid within sixty days from the date when the renunciation above referred to in paragraph 3 shall become operative.

Until said renunciation of the rights under Ordinance No. 6139, C. S., shall become operative, the New Orleans Belt and Terminal Company shall have the right to operate said track.

SECTION 17. Be it further Ordained, etc., That this ordinance shall be accepted within sixty days from the date of its promulgation by a resolution of the Board of Directors of said company, and by an act before the City Notary, and when so accepted shall be a contract between the City of New Orleans and said company, its successors and assigns.

Adopted by the Council of the City of New Orleans, February 3rd, 1903.

(Signed)

T. W. CAMPBELL,

Clerk or Council.

Adopted by the Council of the City of New Orleans, February 10th, 1903, by the necessary two-thirds vote, as required by Section 28 of the City Charter, the veto of the Mayor to the contrary notwithstanding.

(Signed)

T. W. CAMPBELL,

Clerk of Council.

A true copy,

(Signed)

T. W. CAMPBELL,

Clerk of Council.

N. O., M'e'h 23/'09.

A true copy.

[SEAL.]

(Signed)

W. P. BALL,

Sec'ty to Mayor.

[Endorsed:] "A 2." No. 79743. Div. "C." Martin Behrman et als. vs. La. Ry. & Nav. Co. Offered in evidence by Pl'tff. Filed April 19th 1909. (Signed) Joe Baridel, d'y cl'k.

421 EXHIBIT MARKED "A-3" (ORDINANCE NO. 244-N. C. S.).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

421a A-3.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Sept. 14th, 1900.*

Calendar No. 353.

No. 244, New Council Series.

Whereas, The City of New Orleans by ordinance No. 147, N. C. S., has committed herself to the construction of a double track belt railroad along the river front of the city, and by inference such rear connections as may be necessary to establish a continuous line of communication around the outer limits of the city, and,

Whereas, The said ordinance No. 147, N. C. S. has dedicated a space of ground on the river front from Girod street to Barracks street only of all the space necessary to be occupied by such belt railroad, and,

Whereas, It is important and necessary to determine, at the earliest practicable date, if there is space on the river front both above Girod street and below Barracks street, for the projection of the said double track belt railroad beyond the space already dedicated, and for this Council to dedicate such additional extended space as may be required:

Therefore, be it ordained:

SECTION 1. That the City Engineer be and he is hereby directed to survey the river front, from Penniston street to Girod street, and from Barracks street to the lower limits of the city, and to plat the results of such survey on a map of the same scale, now on file in his office, designated "Belt Railroad Map No. 1," approved July 30th, 1900, the map to show the location of all private and public property along the river front and reasonably adjacent thereto between the points above referred to; the map to also show the location of all existing railroad tracks, spurs, switches, etc.

SECTION 2. That the City Engineer be and he is hereby directed to investigate the authority under which all existing railroad tracks, spurs, switches, etc., have been built, and write on the map referred to in Sec. 1 the number of the ordinance granting the permission to build the said railroad tracks, spurs, switches, etc.

SECTION 3. That the City Engineer be and he is hereby
421b directed, upon completion of the survey and map, to refer the same to the City Council accompanied by a written report.

SECTION 4. That the City Engineer be and he is hereby authorized to employ such additional force as may be necessary to execute the provisions of this ordinance, and that the sum of one thousand dollars (\$1,000.00) to pay such additional force be set aside out of item 5 of the reserve fund of 1897 to the account known as City Engineer's office supply account.

Adopted by the Council of the City of New Orleans, September 11th, 1900.

T. W. CAMPBELL,
Clerk of Council.

Approved Sept. 14th, 1900.

PAUL CAPDEVIELLE, *Mayor.*

A true copy.

ARTHUR McGUIRK,
Secretary to the Mayor.

N. O., M'ch 23/09.

A true copy.

[SEAL.] (Signed) W. P. BALL,
Sec't'y to Mayor.

[Endorsed:] "A-3." 79743. Div. C. Martin Behrman et als. vs. La. Ry. & Nav. Co. Offered in evidence by Plaintiff. Filed April 19th, 1909. (Signed) Joe Garidel, d'y cl'k. Paid Apr. 16, 1909. Civil District Court. Thomas Connell, Clerk.

422 EXHIBIT MARKED "A-4" (ORDINANCE NO. 147-N. C. S.).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

422a

A-4.

MAYORALTY OF NEW ORLEANS,
CITY HALL, Aug. 11th, 1900.

Calendar No. 118.

No. 147, New Council Series.

An Ordinance Establishing a Public Belt Railroad System in and for New Orleans.

Whereas, the commercial levee, in the port of New Orleans, La., is public, i. e., belongs to the people for the purposes of commerce; and,

Whereas, this public levee cannot be legally alienated or obstructed so as to prevent the free and equal use of it by all persons who require it for the purposes of commerce; and,

Whereas, the export and import commerce of New Orleans is dependent upon the free and untrammelled use of the levee front of this port, and will be upbuilt if the control of the water front remains in the hands of the public representative business citizens, and will be dwarfed and perverted if it passes into the hands of any railroad corporation, even under the most stringent restrictions; and,

Whereas, the present experience of separate sections of the levee being controlled by different railroad corporations, demonstrates that Railroads further their own interests by oppressing and imposing upon general business by each corporation as much for handling freight over its section as would be a full charge; for traversing the entire water front; and,

Whereas, by the recent decision of the United States Supreme Court in the Texas and Pacific case, and by the expiration of the Schreiber belt-franchise in 1899, and the approaching expiration of the Southern Pacific franchises, more than three-fourths of the city water front reverts to the control of the city of New Orleans, it becomes imperative that action should be taken now to insure the future greatness and prosperity of this port; and,

Whereas, a public railroad along the river front would be a permanent public improvement to the city, and great commercial growth must ensue to the city from unrestricted use by all railroads of our water front, with equal rights to all and special privileges to none, at a minimum cost.

Be it ordained by the Common Council of the City of New Orleans:

SECTION 1. That a belt railroad board for the City of New Orleans is hereby created, to be composed of the mayor, president of the council, city treasurer, comptroller, commissioner of police and public buildings, commissioner of public works, the city engineer and three members of the City Council to be elected by the Council.

SEC. 2. That the objects and purpose of the belt railroad board are to acquire, own, construct, control, maintain and operate, under any and all of the provisions of this ordinance, in the name of and for the benefit of the city of New Orleans and its citizens, a public belt railway in the city of New Orleans, to be located along the river front, from Protection levee to Louisiana avenue; to St. Joseph street, to Press street, and to be extended around or through the city upon such streets or roadways as the city council may designate.

To enable the belt railroad board to carry — its objects and purposes, it is authorized and empowered, in the name of the city of New Orleans, to contract for, acquire, construct, establish, purchase or make any contract or agreement which will inure to the municipality of the city of New Orleans and its citizens, under any and all of the provisions of this ordinance, in respect to a belt railway system.

SEC. 3. That the hereinbefore referred to route, of sufficient width to lay not less than two tracks, is hereby declared a public belt railway highway, for the purpose of improving and facilitating the operations of commerce in the city of New Orleans, and of removing impediments to free public travel and transportation thereon, and is hereby declared dedicated to such use and purpose for the public of New Orleans and all people, and the right of way thereon and

therethrough, is freely and fully granted to the public belt railway herein organized.

SEC. 4. That the construction of the public belt railroad shall be commenced without delay and two tracks shall be completed, between Girod street and Barracks street, on the right of way in the rear of the Cromwell shed, indicated on a map in the office of the City Engineer of date, July 30, 1900, marked Belt Railroad Map No. 1, to identify the same herewith, and the same is made part of this ordinance; and the tracks shall be extended along the lower part of the river front, as early as practicable, and the Schreiber belt track or tracks along the river front shall be taken possession of by the Belt Railroad Board for the City of New Orleans; and all the tracks shall be extended and connected by the Belt Railroad Board as early as practicable to connect with the belt railroad tracks to be constructed for the City of New Orleans by the Chicago, St. Louis and New Orleans Railroad under Ordinance No. 15,080, so as to secure a double track belt railroad from the Protection levee, at Carrollton, to Kentucky street in the Third District; and said Belt Railroad Board is empowered to construct such connecting tracks, sidings, cross-overs, spurs and switches as may from time to time be necessary for the commerce of the city, and to connect each of said tracks with the other, and with any railroad adjacent, or with the property of any commercial or manufacturing enterprise alongside of the belt railroad; provided, that the Cromwell Steamship Company shall not be asked, or required to remove its freight shed or depot, until the Belt Road herein provided for, is in course of construction, and such removal is necessary to make room for said Belt Road; the distance, to which said structures are to be removed, not to exceed twenty-two feet, as above provided, exclusive of the overhang of the shed.

SEC. 5. In order that the Cromwell Steamship Company may not be deprived of the trackage facilities, necessary for handling the business between its ships and the cars of the railroad companies, the Belt Railroad is authorized and directed to make an exchange of tracks between Conti street and a point 131 feet south of St. Ann street, with the Louisville and Nashville Railroad Company, by means of switches and cross-over tracks, so that said Belt Railroad track may be used by the Louisville and Nashville Railroad Company, next to the river and alongside said Cromwell freight shed, while the Belt Railroad, within said limits, shall use the second and third tracks from said shed; provided, that the privilege of making said exchange of tracks shall be revocable at the pleasure of the council.

SEC. 6. That the public belt railroad shall receive and transport passengers, tonnage, and cars, loaded or empty, without delay or discrimination, for any and all railroads, public carriers, firms, corporations or individuals, without distinction subject to such rules, regulations and conditions as may be necessary for the safe and convenient use of the same, at a charge not to exceed \$2 per car, for placing a car (not exceeding forty tons capacity) and returning same empty, or vice versa.

SEC. 7. That there is hereby appropriated to the public belt railroad board for the City of New Orleans, for the purposes above indicated, out of the reserve funds, and to be paid from the first 60 per cent of the receipts in such funds, each year, the sum of \$10,000 for the years 1901, 1902, 1903 and 1904, to be paid over to the belt railroad board, daily as collected.

All contracts to be made in accordance with the city charter.

SEC. 8. That the management and control of the public belt railroad shall be separate and distinct from that of any railroad entering the City of New Orleans and shall remain forever the property of the City of New Orleans; and no employé, director or officer of any State or interstate railroad shall be employed by or allowed to act as director, commissioner or manager of the public belt railroad.

SEC. 9. That the said board shall make all regulations and by-laws for the conduct of its business as it sees fit; to do all things necessary to accomplish its objects and purposes; to employ all needful persons and force, and to fix their compensation; to be paid by said board exclusively from the earnings of the belt railway system.

The city attorney shall be ex-officio attorney for said board, and the board shall have the power to employ and compensate additional counsel whenever necessary; and the city attorney with the concurrence of the said board and the council, shall have the right to select such counsel.

422e SEC. 10. That the city of New Orleans shall not become liable for any of the debts and charges of the Belt Railroad Board, beyond the \$40,000 herein specially appropriated; and the property acquired by said board, for and in the name of the City of New Orleans, shall not be in any manner responsible for the debts and charges of said board. The object being to confine the payments of all the expenses of said board to the earnings of the board.

SEC. 11. All ordinances and parts of ordinances in conflict with this ordinance are hereby repealed.

Adopted by the Council of the City of New Orleans, Aug. 7, 1900.

T. W. CAMPBELL,

Clerk of Council.

Approved Aug. 11, 1900.

PAUL CAPDEVIELLE, *Mayor.*

A true copy.

ARTHUR McGUIRK,

Secretary to the Mayor.

N. O., M'ch 23, '09.

A true copy.

(Sg.) W. P. BALL, [SEAL.]

Sec'y to Mayor.

[Endorsed:] "A-4." No. 79743. Div. "C." Martin Behrman et als. vs. La. Ry. & Nav. Co. Offered in evidence by Pl't'ff. Filed April 19th, 1909. (Signed) Joe Garidel, d'y cl'k. Passed Ap'l 16, 1909, Civil District Court, Thomas Connell, Clerk.

423 EXHIBIT MARKED "A-5" (Ordinance No. 1997, N. C. S.).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

423a

MAYORALTY OF NEW ORLEANS,
CITY HALL, *September 4th*, 1903.

Calendar No. 2572.

No. 1997 New Council Series.

An Ordinance granting rights of way and depot and other rights and privileges to the Louisiana Railway and Navigation Company.

SECTION 1. Be it ordained by the Council of the City of New Orleans, That the Louisiana Railway & Navigation Company, a corporation organized under the laws of the State of Louisiana, and domiciled in the City of Shreveport, its successors and assigns, is hereby granted the right to enter the City of New Orleans, and to construct, maintain and operate with steam, electric or other power, its line of railway tracks along, across and over the streets, highways and public places hereinafter mentioned, and to acquire for railway purposes by expropriation or otherwise, all property in the City of New Orleans needed for railway purposes, such as tracks, spurs, sidetracks, yards, water or oil tanks, shops, platforms, sheds, warehouses, roundhouses, coal chutes, loading bins, wharves, elevators, depots and other appropriate purposes, and particularly the property hereinafter designated.

SECTION 2. Be it further ordained, etc., That said Company, its successors and assigns, is hereby granted the following rights
423b of way in and through the City of New Orleans, to-wit:

(1) Commencing at a convenient point in the west line of the Parish of Orleans, Louisiana, near the intersection of Protection and Oleander streets, said company shall have the right to construct, equip and maintain, two standard gauge tracks, with such turn-outs, cross-overs and switches as may be necessary, along, across and upon the following named streets, viz: Protection, Oleander, Livingston, Forshey, Live Oak, Olive, Cherry, Edinburgh, Laurel Grove, Hamilton, Palm, Holly Grove, Stroelitz, General Ogden, Palmetto, Eagle, Dixon, Monroe, Leonidas, Joliet, Peach, Cambronne, Dante and the Shell Road, all of said streets being located in the Seventh Municipal District, to the New Basin Canal, thence across the New Basin Canal with a draw bridge at grade with the Shell Road, and across Florida Landing to and into square of ground designated by the Municipal Number 776, located in the First Municipal District; thence through said square to South Carrollton Avenue, and across South Carrollton Avenue to Poydras Canal or City Ditch; thence with as many tracks as it may choose to lay, along and upon said Poydras Canal or City

Ditch in a southeasterly direction to Poydras street at its junction with White street, after filling said City Ditch as herein provided. Provided, that the right to cross the New Basin Canal with the drawbridge at grade, as above stated, is granted upon the condition that the said Company place the pier of said drawbridge on the east side of the Canal and as close to the bank of said Canal as practicable. Plans for said crossing to be approved by the Board of Control of the New Basin Canal and Shell Road. The turning apparatus for said bridge to be operated by both hand and power devices, and said bridge to be always turned promptly on the usual notice being given by any water craft plying said Canal.

Provided, further, that where the tracks of said Company cross the tracks of the Orleans and Jefferson Railroad and the Shell Road of the New Basin Canal, said Company shall maintain and operate, at its expense, gates and signals.

(2) Commencing at said junction of White and Poydras streets, said Company shall have the right to construct, equip and maintain one standard gauge track along and upon Poydras street to Lafayette street, thence along and upon Lafayette street to South Claiborne street.

(3) Said Company shall have the right to construct, equip and maintain, one standard gauge track, from a point in the main line, at or near the junction of Poydras and South White streets, thence along and upon the north bank of the New Basin Canal, also known as Julia street or Florida Landing, to Liberty street, with the right to make switches and curves from said track into its property, acquired and to be acquired, as hereinafter set out. Provided said track shall be laid between Liberty street and Claiborne street immediately adjacent to the sidewalk or banquette line, starting at said banquette line and extending into the street for a distance of eight (8) feet from said banquette line. From Claiborne street to White street, said track to be laid on such portion of Julia street, or Florida Landing, as may be designated and approved by the Board of Control of the New Basin Canal and Shell Road. Said track to be laid flush with the street and maintained between the rails and for two feet on each side thereof at the expense of said Company. There

shall be no parking of cars permitted upon the track provided for under this paragraph of this section under penalty of \$25.00 fine for each violation of this requirement, recoverable before any court of competent jurisdiction at the instance of the Board of Control of the New Basin Canal and Shell Road.

(4) Said Company shall have the right to construct, equip and maintain, one standard gauge track, from the track provided for in the first paragraph of this section, leaving the same at the junction of Lafayette and Cypress streets along and upon Cypress street to Liberty street, with the right to construct turn-outs and switches from said track into its property, acquired or to be acquired, and to connect the track provided for in this paragraph with the track hereinabove provided for on Julia street.

SECTION 3. Be it further ordained, etc., That, whereas, under Ordinance No. 1615 N. C. S., the New Orleans & San Francisco Railroad Company, its successors or assigns, have been granted the right to construct, at their own cost and expense, the double track Belt line over the Belt reservation on the river front, from the present end of the Public Belt on the upper side of Audubon Park to Henderson street, and under said ordinance said Company dedicates said tracks to perpetual public use, therefore, under the Belt provisions of said ordinance No. 1615, N. C. S., and with the limitations therein which recognize and preserve the present and future rights of the City of New Orleans over the projected Public Belt Railroad.

The Louisiana Railway & Navigation Company is hereby granted a right of way over the double track Belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson street, upon the following terms and conditions:

(a) That, when said Louisiana Railway & Navigation Company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, the said Company shall pay to the City of New Orleans the sum of Fifty Thousand Dollars (\$50,000), which sum is to be deposited with the Fiscal Agent of the City of New Orleans, to the credit of a special fund, and said fund shall not be used for any other purpose than the extension, equipment and operation of said Public Belt Line and the construction of said Belt tracks, switches, side tracks, spurs and turn-outs, and the payment of the costs of right of way for such Belt system; but no portion of this money shall be used for expenses of operation until the Belt tracks are completed to Clouet street, and, when said Company shall be ready to begin to operate its engines, trains and cars as above provided, the said Company shall deliver to the Fiscal Agent of the City of New Orleans, bonds or other securities, satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said Company with the foregoing obligation, and to be returned to said Company when said Company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, and shall have paid said sum of fifty thousand dollars to said Fiscal Agent. If, for any reason, said Company shall not have or be accorded the right to operate its engines, trains and cars over said Belt tracks, as provided in this ordinance, then such securities shall be returned to said Company by said Fiscal Agent.

(b) That in consideration of the payment of the above sum, the Louisiana Railway & Navigation Company shall have the right to operate its own locomotives, cars and equipment over the said Public Belt from the upper city limits to Henderson street, provided that said Company and all railroads using said tracks shall belt all cars to and from their respective lines over all switches, spurs and sidings forming part of the Public Belt tracks, free of cost.

(c) That in the event of the New Orleans & San Francisco Rail-

road Company, its successors or assigns, failing, without legal excuse, to build said Belt tracks from the upper side of Audubon Park to Henderson street, on or before July 1st, 1904, the Louisiana Railway & Navigation Company shall build the same from the upper side of Audubon Park to Henderson street, under the terms and conditions of Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., and, in case said Louisiana Railway & Navigation Company shall build said tracks, it is hereby granted the right and privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of said Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., said Louisiana Railway & Navigation Company assuming the obligation of the New Orleans & San Francisco Railroad Company under said paragraph of said ordinance, and being hereby granted all the rights and privileges of said New Orleans & San Francisco Railroad Company, its successors or assigns, under said Paragraph 10 of Section 2 of said Ordinance, except as hereinafter provided, such construction of said tracks from the upper side of Audubon Park to Henderson street to be in lieu of the payment of \$50,000, referred to in Paragraph (a) of this section; provided, that said Louisiana Railway & Navigation Company shall complete the said tracks to Henderson street within one year from the 423g time the City shall furnish the clear and undisputed right of way, it being always understood that said Louisiana Railway & Navigation Company assumes all the obligations of the New Orleans & San Francisco Railroad Company under Paragraph 10 of Section 2 of said Ordinance No. 1615, N. C. S.; and provided that, as soon as said Belt tracks shall be completed to Henderson street, the same shall be turned over to the immediate ownership of the City of New Orleans and to be under the control and management of the Public Belt Authority; and provided, further, that said Louisiana Railway & Navigation Company shall, on July 1st, 1904, deposit with the Fiscal Agent of the City of New Orleans, bonds or other securities satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said Company with the foregoing obligation and to be returned to said Company when said Company shall have built and completed said Belt tracks from the upper side of Audubon Park to Henderson street; and provided, further, that in case said Company shall be prevented from building said Belt tracks, or any portion of the same, on account of the City not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said Fiscal Agent.

Provided further, that nothing in this ordinance or in this section or clause shall be construed as a waiver or abandonment of the rights that the City of New Orleans now has or may hereafter have under and by virtue of the provisions of Ordinance No. 1615, N. C. S.; and provided further, that nothing in this ordinance, section or clause shall be construed to relieve the New Orleans & San Fran-

cisco Railroad Company, its successors or assigns, from any
423*h* of its obligations to the City of New Orleans arising under the provisions of Ordinance No. 1615, N. C. S., and especially under Paragraph 10 of Section 2 of said Ordinance, it being distinctly understood and declared that the City shall be entitled to enforce all its rights under said Ordinance No. 1615, N. C. S., precisely as if this present Ordinance had not been passed at all.

(*d*) That in the event the New Orleans & San Francisco Railroad Company, its successors and assigns, shall, from any cause, complete only a portion of the tracks from the upper side of Audubon Park to Henderson street, the Louisiana Railway & Navigation Company, its successors and assigns, shall have the right to operate its own locomotives, cars and equipment over such portion of the tracks as is already built, and as may be built by the New Orleans & San Francisco Railroad Company, its successors and assigns, and for such privilege shall pay to the City of New Orleans such proportion of the sum provided in Clause (*a*) of this paragraph as the tracks so constructed and used by said Louisiana Railway & Navigation Company bear to the whole length of the tracks from upper city limits to Henderson street.

(*e*) Unless otherwise ordered by the "Public Belt Authority," or until said "Public Belt Authority" is operating its own equipment over said system, completed to Clouet street, the Louisiana Railway & Navigation Company agrees to belt cars belonging to connecting railroads or to individuals, firms or corporations, over the belt line, and over all switches, spurs and sidings connected therewith and forming part thereof, without discrimination, treating and handling such belted cars as justly and as equitably as if they were its own cars coming off its own lines, charging for such service not exceeding \$2.00 per car, for placing a car and returning same empty,
423*i* or vice versa; provided, however, that a similar obligation shall be hereafter placed on every contributing railroad here-

after admitted to the use of said belt tracks, and provided further, that said Louisiana Railway & Navigation Company shall not, under this clause, or under any other clause of this ordinance, be obligated to belt cars for any railroad company not now operating a line in the City of New Orleans, unless such other railroad shall become a contributor as herein provided to the Belt Road construction fund.

(*f*) That all controversies between the Louisiana Railway & Navigation Company on the one side, and the Public Belt Authority, or any other Company or Companies to which the City or her Public Belt Authority may grant the use of said tracks and appurtenances on the other side, relative to the use of said tracks and appurtenances or the cost of construction or maintenance thereof, or the rules and regulations relative to the movement and handling of cars, trains and traffic thereon and thereover, shall be submitted to the arbitration of three disinterested persons, one to be selected by said Louisiana Railway & Navigation Company, the second by the Public Belt Authority, or such other Company or Companies as the case may be, and the third by the two thus chosen; and the decision of this tribu-

nal, or any two of them, shall have the effect of an amicable composition.

(g) That all damages to life and property caused by the fault or negligence of the officers or employes of any company, while operating over said Belt tracks shall be borne exclusively by said Company, and the City shall in no respect be responsible therefor.

(h) That the Louisiana Railway & Navigation Company, its lessees, successors and assigns, shall not discriminate at any time, illegally or unjustly, against the City of New Orleans.

(i) That the said Louisiana Railway & Navigation Company, its lessees, successors and assigns, shall be bound to switch or belt, without unreasonable delay, over its main tracks within the limits of the City of New Orleans, and over all other tracks laid in the public streets or public places within said City limits, and all switches connected therewith, owned, controlled or leased by said Railway Company, its lessees, successors or assigns, except into the private property or terminals of said Railway Company, that is, depots, warehouses, elevators and other like terminals, owned or operated by the Railway Company, its lessees, successors and assigns, for a reasonable compensation, not to exceed the maximum charge of \$2.00 per car, its own cars, the cars originating on the Public Belt, and the cars of any other railroad company now operating, or which may hereafter operate, a line of railroad within the City of New Orleans, also cars belonging to individuals, firms or corporations, when such service shall be requested and no discrimination shall be made between different companies or individuals entitled to and requesting such service; provided, that said Railway Company, its lessees, successors and assigns, shall not be obliged to switch cars to or from the tracks of other railroad companies for a less sum than other railroad companies charge it for a similar service, until such time as other railroad companies operating in the City of New Orleans agree with the City of New Orleans upon a fixed switching or belting charge; nor shall it be obliged to perform such service on its main tracks for any railroad that refuses to perform the same service for it on its main tracks and for the same charges

423k and under the same conditions. All cars coming to the City over the lines of the Louisiana Railway & Navigation Company shall be delivered to points on its tracks free of belting charges.

(j) That the movement of trains, cars, and traffic on and over said tracks from the upper limits of the City to Henderson street, until the City completes her Belt system to Clouet street, and begins to operate them as a part of said system, shall be under the joint direction, control, and management of the New Orleans & San Francisco Railroad Company, its successors and assigns, and the Louisiana Railway & Navigation Company, its successors and assigns, unless during this period the Public Belt Authority shall grant other railroads a right of operation over said tracks similar to that herein granted to the Louisiana Railway & Navigation Company, in which event the control and management of movement of trains, cars, and traffic over said tracks, to Henderson street, shall be under the joint control of such companies as may be granted the

same right of operation over said tracks, and when the City shall begin to operate said tracks as part of her Belt system, the movement of trains, cars, and traffic on and over said tracks shall be under the sole direction, control and management of the Public Belt Authority of the City of New Orleans, provided always that there shall be no discrimination against the trains, cars, and traffic of the Louisiana Railway & Navigation Company or any other Company, granted the right to use said tracks. Until the City begins to operate said tracks as a part of her Belt system, the whole cost of maintenance, operation and management shall be borne jointly by the

423l New Orleans & San Francisco Railroad Company, its successors and assigns, and the Louisiana Railway & Navigation Company, its successors and assigns, on a wheelage basis, unless during this period the Public Belt Authority shall grant to other railroads a right of operation over said tracks similar to that herein granted to said Louisiana Railway & Navigation Company, in which event the cost of maintenance and the usual and proper parts of the cost of operation and management shall be borne on a wheelage basis by all companies operating over said tracks. If, however, the Belt is not completed to Clouet street, by July 1st, 1907, and the tracks to Henderson street, or any part thereof, are constructed by the New Orleans & San Francisco Railroad Company, the sole control and management of said Belt tracks shall revert to the Public Belt Authorities of the City of New Orleans; provided, always, if for any reason the City of New Orleans or her Public Belt Authorities shall not assume control and management of said tracks on July 1st, 1907, the Louisiana Railway & Navigation Company shall have the same right of control and management of the movement of trains, cars and traffic over said tracks as has heretofore, or may be hereafter granted to any railroad company.

(k) That in the event said Belt tracks shall be completed to Clouet street, and said Louisiana Railway & Navigation Company shall desire to use that portion of the Belt which may be built from Henderson street to Clouet street, it shall have the right to operate its trains, cars, and traffic over the completed Belt, upon the payment to the Fiscal Agent of the City for the use and benefit of the Belt Fund, of a sum which, added to the sum to be paid under Clause (a), Section 3, of this ordinance, shall make the total sum paid by said Louisiana Railway & Navigation Company equal to the cost of the construction of the Belt tracks from the 423m upper side of Audubon Park to Henderson street, expended by the New Orleans & San Francisco Railroad Company, its successors or assigns, in the construction of said tracks from the upper side of Audubon Park to Henderson street, as provided in Ordinance No. 1615 N. C. S. "Provided, that in the event the Belt shall be extended to Clouet street, and that the Louisiana Railway & Navigation Company shall not avail itself of the right to pay the additional sum as above provided and use the Belt to Clouet street within a period of five years from the time said Belt is completed to Clouet street, then and in that event, the said Louisiana Railway & Navigation Company shall pay to the Public Belt Authority of the

City of New Orleans the sum of Thirty Thousand Dollars (\$30,000), the use and destination of said sum to be the same as provided for in the payment of the Fifty Thousand Dollars (\$50,000) as above provided for. Said additional payment of Thirty Thousand Dollars shall in no wise, however, authorize the using of the Belt below Henderson street by the said Louisiana Railway & Navigation Company.

Provided, further, that any use by the Louisiana Railway & Navigation Company of the Belt track from Henderson street to Clouet street, after the same shall have been completed, shall be deemed conclusive evidence of its agreement to accept the use of said entire Belt, but shall not bind the said Louisiana Railway & Navigation Company as admitting the cost of the construction from the upper limits of Audubon Park to Henderson street, to be the amount stated by the New Orleans & San Francisco Railroad Company, its successors and assigns. It being understood that this right is granted under the limitations of Ordinance No. 1615 N. C. S., which recognize and preserve all the present and future rights of the City of New Orleans over the projected Belt Railroad from the upper limits of the City to Clouet street.

SECTION 4. Be it further ordained, etc., That the said Company shall have the right to acquire, by expropriation or purchase, the eighteen squares of ground designated by the Municipal Numbers Five Hundred and Ninety-nine (599), Five Hundred and Eighty-eight (588), Five Hundred and Seventy-three (573), Five Hundred and Sixty-one (561), Five Hundred and Forty-four (544), Five Hundred and Thirty-one (531), Five Hundred and Fifteen (515) Five Hundred and Two (502), Four Hundred and Ninety-two (492), Four Hundred and Seventy-nine (479), Four Hundred and Fifty-nine (459), Four Hundred and Forty-five (445), Four Hundred and Twenty-six (426), Four Hundred and Eleven (411), Three Hundred and Ninety-five (395), Three Hundred and Seventy-eight (378), Three Hundred and Sixty-one (361), and Three Hundred and Forty-six (346), all being situated in the First Municipal District of the City of New Orleans and lying between Julia, Liberty, Cypress and Poydras, streets, and the intersection of Poydras and Julia streets at White street; also all of those fractional blocks, or squares of ground lying between Lafayette and Cypress streets from South Valvez to South Claiborne street, viz: Numbers Five Hundred and Fifteen and one-half (515½), Five Hundred and One (501), Four Hundred and Ninety-three (493), Four Hundred and Seventy-eight (478), Four Hundred and Sixty (460), and the fractional blocks or squares of ground lying between Poydras and Lafayette streets from Rocheblave to Galvez streets, viz: Five Hundred and Sixty (560), Five Hundred and Forty-five (545), and Five Hundred and Thirty (530), and upon the property so acquired, to construct, establish and maintain all facilities of every kind and nature necessary, appropriate and convenient for its railway purposes, such as car-yards, car-sheds, shops, roundhouses, coal yards, bins and chutes, freight sheds and warehouses, elevators, loading and unloading plat-

forms, car, freight and passenger depots and their appurtenances; and to this end, for these purposes, to lay tracks across the following streets between Cypress street and Julia street, or Florida Landing, viz: Tonti, Miro, Galvez, South Johnson, South Prieur, South Roman, South Derbigny, South Claiborne, Willow, Clara, Magnolia, South Robertson, Freret and Howard streets, and also across the following streets between Lafayette and Cypress streets, viz: South Johnson, South Prieur, South Roman, South Derbigny, and South Claiborne streets; and also across Miro and Tonti between Lafayette and Poydras streets, and also across the following streets between Poydras and Julia streets, viz: South Rocheblave, South Dorgenois and South Broad streets.

SECTION 5. Be it further ordained, etc., That nothing herein contained shall be construed as restricting the said Company to the property herein mentioned for railroad and terminal purposes, but it shall have the right, from time to time, to extend its terminal area, and to acquire as many squares of ground adjacent to the squares and routes herein specified as its business may require, and to connect said property by tracks and switches to the routes and property herein set forth, and for that purpose to extend its switches and tracks along and across intervening streets to reach all such additional property acquired for terminal purposes. It shall

423p further have the right to construct switches and sidetracks into industries that may be, from time to time, established adjacent to its routes, and terminal properties, and to cross and use the intervening streets for such tracks. The words "adjacent squares" or "adjacent property" in this section shall be construed to mean only such squares or property as are separated from the property or routes of said Company by the width of a single intervening street. The said Company shall also have the right to connect, by all necessary and convenient switches and turn-outs, its property and terminals on the Mississippi river, now acquired or hereafter to be acquired, with the double track Belt Line and reservation on the river front of the City.

SECTION 6. Be it further ordained, etc., That with the permission of the Board of Control of the New Basin Canal and Shell Road, previously obtained, said Company shall have the right to lay switches and sidetracks along the banks of the New Basin Canal for the purpose of the interchange of traffic between the same and the road of said Company. Provided, that in no event shall any track or switches be laid as above provided beyond the property line on the "wood side" of South Liberty street.

SECTION 7. Be it further ordained, etc., That said Company shall have the right and privilege to set up telegraph and telephone poles along the rights of way and tracks herein granted except on Julia street or Florida Landing, and so string wires over, across and along the public highways aforesaid, such poles and wires, however, not to impede or obstruct unnecessarily the use of such public highways.

423q SECTION 8. Be it further ordained, etc., That all of the above tracks laid along and across the public highways shall

be laid on lines and grades to be approved by the City Engineer, and shall be so laid and maintained as not to interfere with or obstruct the drainage of the city, or the reasonable use of the said streets. Cars shall not be parked on tracks constructed along the highways aforesaid, nor shall they stand or be parked so as to obstruct any cross street. No structure shall be built by said Company **conflicting** in any way with the present or proposed system of Sewerage, Drainage, or Water Works, until a plan of the same has been approved by the Drainage Commission or Sewerage and Water Board, or their successors, through the properly authorized officer of such Board or Boards. Such approval of plans, however, shall not operate in any way to relieve the said Louisiana Railway & Navigation Company from responsibility for any damage which may be caused to the works of the said Boards by the construction or operation of its system.

SECTION 9. Be it further ordained, etc., That all streets through and across which the tracks of said Company are laid shall be kept in good order and condition between the rails and two feet on each side thereof. All pavements taken up in the laying of such tracks shall be relaid at the Company's cost to the satisfaction of the City Engineer and the Commissioner of Public Works, and shall be thereafter maintained between tracks and for two feet on each side thereof. On all streets not now paved, which may hereafter be paved by the City, the said Company shall pay the cost of paving between the rails and two feet on each side thereof, and the
423r same rule shall apply to the renewal of pavements on streets now paved.

SECTION 10. Be it further ordained, etc., That between White street and Liberty street, the speed of the trains of said Company shall not exceed ten miles per hour; and between White street and the city limits, it shall not exceed twenty miles per hour.

SECTION 11. Be it further ordained, etc., That said Company shall begin construction work within the City of New Orleans within six months from its acceptance of this ordinance.

SECTION 12. Be it further ordained, etc., That said Company shall, at its own expense, fill, with suitable material, the old Poydras Drainage Canal, or City Ditch, from Rocheblave street to Carrollton Avenue.

SECTION 13. Be it further ordained, etc., That all grants and privileges herein given are made for the period of the Charter of said Company, its successors and assigns.

SECTION 14. Be it further ordained, etc., That nothing in this ordinance shall be construed as a restriction upon the lawful and reasonable exercise of the police power of the City of New Orleans over said Company and its operations within the limits of the City of New Orleans.

SECTION 15. Be it further ordained, etc., That this ordinance shall be accepted within sixty days from the date of its promulgation by a resolution of the Board of Directors of said Com-
423s pany, and by an act before the City Notary, and when so accepted shall be a contract between the City of New Orleans and said Company, its successors and assigns.

Adopted by the Council of the City of New Orleans, September 1st, 1903.

E. T. MANNING,
Assistant Clerk of Council.

Approved September 4th, 1903.

PAUL CAPDEVIELLE, *Mayor.*

A True Copy:

JOS T. BUDDECKE,
Acting Secretary to the Mayor.

N. O., M'ch 23/09.

A true copy.

(Signed) W. P. BALL,
[SEAL.] *Sec'y to Mayor.*

Ordinance 1997.

(Endorsed:) "A 5." No. 79743. Div. "C." Martin Behrman et als. vs. La. Ry. & Nav. Co. Offered in evidence by plaintiff. Filed April 19th, 1900. (Signed) Jos. Garidel, D'y Clerk.

Filed April 19, 1909.

424 EXHIBIT MARKED "A-6" (Ordinance No. 2683, N. C. S.).

Offered in Evidence by Counsel for Plaintiff.

424a

MAYORALTY OF NEW ORLEANS,
CITY HALL, Oct. 8, 1904.

Calendar No. 3364.

No. 2683, New Council Series.

An ordinance amending and re-enacting Sections 1, 2 and 4 and repealing Sections 3, 5, 8, 9 and 11 of ordinance No. 147, N. C. S., adopted August 7, 1900; adding to said ordinance, as new sections, a section to be numbered 3 and a section to be numbered 11; and renumbering Section 10 of said ordinance, to be known as Section 8.

Whereas, The industrial progress of the city and port of New Orleans renders it a matter of great and even vital importance, that a system of terminal deliveries should be devised, whereby all railroads, all industries and all water craft be enabled to transfer goods without restriction, discrimination or delay; and

Whereas, The present system, as far as it goes, has encumbered

the streets and landings of the city with portions of track, belonging to various corporations, whose competitive interest compel delays and restrictions, at times amounting to prohibitions; and

Whereas, This situation, limiting industries as it does in many cases, to the facilities of the railroad on whose track it is located; and

Whereas, This situation further prevents the location of new industries, that require the widest and freest facilities for collection and distribution of their goods; and

Whereas, It is of great importance that facilities should be provided for the location of industries in the rear of the city, and on the banks of the navigation canals, as well as on the front, whereby said industries and those in the present commercial district can reach and be reached by every railroad or steamship line now trading with the city, or hereafter to come; and

Whereas, In the rear of the city there is a large area of unimproved property, that, provided with terminal facilities as expressed above, would be rapidly improved by various industries; and

4246 Whereas, Such a terminal system could easily establish and operate an industrial and real estate bureau for securing and locating new industries; and

Whereas, Such a terminal system would greatly facilitate the work of collecting and disposing of city garbage, the filling of lots and similar work of public and private utility; and

Whereas, Public policy dictates that new railroads entering New Orleans, and those now here, whose franchises are insufficient or nearly expired, should be furnished terminal facilities upon a broad, permanent, well defined plan, without discrimination; and

Whereas, All tracks now existing or to be built upon the public streets and landings should be for the free use of the public upon the most economical terms; and

Whereas, All this can only be secured and availed of by public ownership and control; and

Whereas, The various private interests involved can only be harmonized and included in a general and comprehensive terminal system, by substitution for same, on equitable terms, of greater advantages than now possessed, by full right to use a comprehensive and enlarged terminal system, covering every point now reached and that can be hereafter reached by railroad tracks within the city limits; and

Whereas, The most practical means whereby conflicting interests can be harmonized, plans prepared, construction and operation can be carried on, is through establishment of a Commission composed of commercial interests, where all concerned shall be fully and fairly represented; therefore,

Be it ordained by the Council of the City of New Orleans:

SECTION 1. That Section 1 of ordinance No. 147, N. C. S., adopted by the Council of the City of New Orleans, on August 7, 1900, be amended and re-enacted so as to read as follows, to-wit: That a board of commissioners be and the same is hereby created, to be known and styled as the Public Belt Railroad Commission,

for the City of New Orleans, to be composed of the Mayor of the City of New Orleans and sixteen citizen taxpayers of the city of New Orleans, who shall be duly qualified electors and shall have resided in said city for a continuous period of five years prior to their appointment, to be appointed by the Mayor of the City of New Orleans, by and with the approval of the Council of the City of New Orleans, and as follows: Three members of the New Orleans Board of Trade, upon the recommendation of the said New Orleans Board of Trade; two members of the New Orleans Cotton Exchange, upon the recommendation of said New Orleans Cotton Exchange; two members of the New Orleans Sugar Exchange, upon the recommendation of said New Orleans Sugar Exchange; two members of the New Orleans Progressive Union, upon the recommendation of said New Orleans Progressive Union; and two members of the Mechanics, Dealers and Lumbermen's Exchange, upon the recommendation of said Mechanics, Dealers and Lumbermen's Exchange; and five members to be appointed from the citizens of New Orleans at large, two of whom shall be from that portion of the city above Canal street, and two of whom shall be from that portion of the city below Canal street; should any of the foregoing organizations cease to exist or be without a legal successor, the members appointed therefrom shall serve out their allotted terms, and their successors shall thereafter be appointed by the Mayor, by and with the consent of the City Council.

The tenure of office of the first appointees shall be as follows: Two for two years, two for four years, two for six years, two for eight years, two for ten years, two for twelve years, two for fourteen years, and two for sixteen years; all terms to date from date of appointment. The successors of the first appointees shall be appointed for terms of sixteen years from the dates of original appointment. The Mayor of the City of New Orleans shall be the President of said Commission and shall have a right to vote at all meetings and upon all questions.

The City Attorney shall be ex-officio attorney of said Commission, and the City Engineer shall be ex-officio engineer of said Commission, and said Commission shall have power and authority to employ additional counsel and engineers whenever necessary. Such additional counsel and engineers to be selected and named by the Commission and to be appointed by the City Attorney and the City Engineer, respectively, upon the recommendation and designation of the Commission, the appointments to be subject to confirmation by the

Council of the City of New Orleans.

425*d* Within thirty days after the appointment and confirmation of the original appointive members of said Commission, said Commission shall meet in the Council Chamber of the City of New Orleans and shall organize. Said Commission shall select a President pro tem., a Secretary-Treasurer, and Industrial Commissioner, an Auditor and a General Manager. The President pro tem. shall be a member of said Commission and shall have active charge, control, management and supervision of the business of said Commission, subject to the direction of said Commission; he shall preside at all meetings of the Commission, in the absence of the

Mayor, and shall perform such other duties as the Commission may designate. The Secretary-Treasurer shall keep the books, papers, records and minutes of said Commission, and shall receive and deposit in such bank or banks as the Commission may designate all moneys, funds and property accruing to the Commission, and shall perform such other duties as said Commission may designate, but no disbursements shall be made of any of the funds of said Commission except after approval of the vouchers by a Finance Committee, composed of three members, to be appointed by the President of said Commission. All checks, warrants or other vouchers for the payment of money shall be signed by the Secretary-Treasurer and countersigned by the Mayor. Said Finance Committee shall perform such other duties as may be designated by said Commission.

It shall be the duty of the Auditor to check and audit all the accounts, receipts and disbursements of the Commission, and to perform such other duties as said Commission may designate.

It shall be the duty of the Industrial Commissioner to furnish, free of charge, general information concerning the public belt railway, its connections and facilities, the advantages it offers to shippers and carriers, and to publish and circulate maps and other data and information to investors, whether in the city of New Orleans or elsewhere, and to all merchants, manufacturers and persons desiring to locate along the line of the public belt railway.

The Secretary-Treasurer, the Auditor and the Industrial Commissioner shall be elected by a majority of the Commission and shall hold office subject to the pleasure of the Commission.

424e The General Manager shall be charged with the physical construction, maintenance, operation and development of said public belt railway. He shall be a person of established reputation as a practical belt railway operator and shall be elected by a two-thirds vote of the Commission and shall hold his office subject to the pleasure of the Commission. He shall be at all times subject to the supervision and control of the President pro tem. of the Commission.

No member or officer of said Commission shall receive any salary or other compensation for services, except the Secretary-Treasurer, the Auditor, the Industrial Commissioner and General Manager, whose salaries shall be fixed and provided for by said Commission whenever said Commission shall deem it advisable, but said Commission shall not be obliged, except within its discretion to allow or pay any salary or compensation to any officer, and shall have the right to combine together any of the offices provided for by this ordinance, except those of President and President pro tem., which shall remain as herein constituted; the President pro tem. shall always be selected from the members of the Commission, appointed upon the recommendation of the business exchanges.

SEC. 2. That Section 2 of Ordinance No. 147, N. C. S., adopted August 7, 1900, be and the same is hereby amended and re-enacted so as to read as follows, to-wit: Section 2—That the objects and purposes of the Public Belt Commission of the City of New Orleans are, and it is, therefore, hereby fully authorized and empowered, to ac-

quire, own, locate, construct, control, maintain and operate, in the name of and for the benefit of the people of the city of New Orleans, a double track public belt railway in the city of New Orleans, together with all spur tracks, switch tracks, sidings, cross-overs, locomotives, cars, depots, warehouses, shops, stations and all other appurtenances to railway location, construction, maintenance and operation; said double track public belt railway to be located, as hereinafter described, upon a public belt railroad reservation, hereinafter dedicated to perpetual public use, as a public belt track railway reservation; and said Public Belt Railway Commission is hereby authorized and empowered, for and in behalf of the people of the city of New

Orleans, to operate said public belt railway for the transportation of merchandise and freight in carloads or less than carloads and for the transportation of passengers, for such rates, charges or tariff as may by said Commission, by and with the approval of the Council of the City of New Orleans, be adopted.

Said Public Belt Railway Commission is hereby authorized and empowered, with the consent and approval of the Council of the City of New Orleans, to transport the street sweepings and the garbage of the City of New Orleans, and any silt, deposit, sand or mud, which may result from the operation of any water plant system or systems in the city of New Orleans, to any point or points within the limits of the city of New Orleans and to dispose of the same in such manner and for such prices as may be determined by said Commission and the Council of the City of New Orleans, and also to transport all other river sand or other material which may be offered to it for transportation over said public belt railway, and to dispose of the same in such manner and for such prices as said Commission shall determine. Said Commission, with the concurrence of the Council of the City of New Orleans, shall have the right to make all lawful contracts or agreements necessary to carry out the purposes for which said Commission is created. Privileges to connect private industries with said public belt railroad shall be obtained from the Council of the City of New Orleans according to law. Said Commission is hereby authorized and empowered to make, enforce, repeal and amend all rules and regulations covering the belting, switching and generally the movement of trains, locomotives, cars and traffic on and over said public belt railroad, which shall be under the exclusive direction, control and management of said Commission. Said Commission is hereby authorized and empowered to issue receipts for merchandise, goods, commodities, etc., in carloads or less than carloads, accepted for transportation, and to sign and issue through bills of lading to points of destination on such terms and conditions as may be agreed upon by said Commission and connecting carriers. Said Commission, by and with the consent of the Council of the City of New Orleans, is authorized and empowered to locate, construct, maintain, connect with, and operate receiving stations along the line of said public belt railway, independently of any switch track connection with said public belt railway, and to locate, construct, maintain and operate a main depot at a point on the river front as near to Canal street as prac-

licable, as may be by said Commission and the Council of the City of New Orleans agreed upon. Said Commission shall have power and authority to make all regulations and by-laws for the conduct of its business as it sees fit, and to do all necessary things to accomplish its purpose and object; to employ all necessary persons and working force and to fix all compensation and salaries. All salaries of officers and employes shall be paid from the funds of the Commission.

SEC. 3. That a new section, to be known as Section 3, be added to said Ordinance No. 147, N. C. S., adopted August 7, 1900, to read as follows, to wit:

SEC. 3. That there shall be and there is hereby irrevocably dedicated to the people of New Orleans, for perpetual and exclusive use, as the location for a double track public belt railway, the title to which said location and said double track public belt railway shall be, and shall forever be, in the people of the city of New Orleans, the following described double track public belt railway reservation, to-wit: The outer half or river side of the strip of ground or neutral ground, said outer half being twenty-five feet wide in the center of the street provided for, created by and arranged in and constructed under Ordinance No. 15,080, C. S., now known as Leake avenue, from the upper parish line of the Parish of Orleans to Peniston street, said outer half or river side of said neutral ground from the upper parish line of the Parish of Orleans to the upper line of Audubon Park, together with the double tracks constructed thereon, and the outer half or river side of said neutral ground from the upper line of Audubon Park to Peniston street, having been, by ordinance No. 15,080, C. S., dedicated in full ownership and complete title to the city of New Orleans for perpetual public use; and a strip of ground measuring twenty-three feet wide and extending along the river front from Peniston street to Louisa street, as indicated on maps on file in the office of the City Engineer, designated as belt railroad map No. 1, approved July 30, 1900, and belt railroad maps No. 2 to 9, inclusive, approved October 22, 1901, which maps are hereby referred to and made a part of this ordinance. The said strip of ground is situated approximately as follows: The distances given in each description are measured from the described point to the lake side of the said strip; at Peniston street, 44 feet, measured riverwards from the lake side of Water street; at west side of Louisiana avenue, 5 feet, measured riverwards from the lake side of Water street; at a point 30 feet west of the east side of Louisiana avenue, 11 feet, measured riverwards from and perpendicular to the lake side of Water St.; at a point 82 feet east of the east side of Louisiana 39 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 162 feet east of the east side of Louisiana avenue, 49 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 88 feet west of the west side of Toledano street, 48 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 52 feet east of the east side of Toledano street, 40 feet, measured riverwards from and perpendicular to the

lake side of Water street; at a point 80 feet west of the west side of Pleasant street, 50 feet, measured riverwards and perpendicular to the lake side of Water street; at a point 64 feet west of the west side of Harmony street, 52 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 77 feet east of the east side of Harmony street, 53 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 16 feet east of the east side of Sixth street, 44 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 134 feet east of the east side of Sixth street, 37 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 17 feet east of the east side of Fourth street, 37 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 109 feet east of the east side of Fourth street, 39 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 5 feet east of the west side of Third street, 29 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 85 feet east of the east side of Third street, 35 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 17 feet east of the west side of Second street, 37 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 8 feet east of the west side of First street, 35 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 50 feet west of the west side of Soraparu street, 37 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 22 feet east of the east corner of Philip street, 36 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 38 feet west of the west side of Jackson avenue, 28 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 2 feet east of the east side of Jackson avenue, 38 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 168 feet east of the east side of Jackson avenue, 37 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 3 feet east of the west side of Josephine street, 38 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 85 feet east of the east side of Josephine street, 45 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 22 feet east of the east side of St. Andrew street, 76 feet, measured riverwards from and perpendicular to the lake side of Tchoupitoulas street; at a point 18 feet west of the east side of Nuns street, 197 feet, measured riverwards from and perpendicular to the lake side of South Peters street; at a point 43 feet east of the west side of Celeste street, 198 feet, measured riverwards from and perpendicular to the lake side of South Peters street; at a point 132 feet south of the south side of Market street, 117 feet, measured riverwards from and perpendicular to the lake side of South Front street; at a point 7 feet south of the south side of Market street, 130 feet, measured riverwards from and perpendicular to the lake side of South Front street, at a point 54 feet north of the north side of Richard street, 201 feet,

measured riverwards from and perpendicular to the lake side of South Front street, at a point 265 feet north of the north side of Orange street, 288 feet, measured riverwards from and perpendicular to the lake side of South Front street; at a point 75 feet south of the south side of Robin street, 495 feet, measured riverwards from and perpendicular to the lake side of South Front street; at a point 112 feet north of the north side of Robin street, 530 feet, measured riverwards from and perpendicular to the lake side of South Front street; at a point 7 feet south of the north side of Terpsichore street, 670 feet, measured riverwards from and perpendicular to the lake side of South Front street; at a point 335 feet north of the north side of Terpsichore street, 699 feet, measured riverwards from and perpendicular to the lake side of South Front street; at a point 24 feet south of the south side of Thalia street, 712 feet, measured riverwards from and perpendicular to the lake side of South Front st.; at north side of Thalia st., 199 feet, measured riverwards from and perpendicular to the lake side of Pilie street; at a point 53 feet north of the north side of Thalia street, 213 feet, measured riverwards from and perpendicular to the lake side of Pilie street; at a point 178 feet north of the north side of Thalia street, 443 feet, measured riverwards from and perpendicular to the lake side of Pilie street; at a point 158 feet north of the north side of Erato street, 266 feet, measured riverwards from and perpendicular to the south side of Pilie street; at a point 27 feet south of the south side of Gaiennie street, 669 feet, measured riverwards from and perpendicular to the lake side of Delta street; at a point 6 feet north of the north side of Gaiennie street, 644 feet, measured riverwards from and perpendicular to the lake side of Delta street; at a point 75 feet north of the north side of Gaiennie street, 605 feet, measured riverwards from and perpendicular to the lake side of Delta street; at a point 34 feet south of the south side of Calliope street, 578 feet, measured riverwards from and perpendicular to the lake side of Delta street; at a point 3 feet south of the north side of Calliope street, 574 feet, measured riverwards from and perpendicular to the lake side of Delta street; at a point 118 feet south of the south side of Girard street, 523 feet, measured riverwards from and perpendicular to the lake side of Delta street; at a point 12 feet north of the south side of Girod street, 90 feet, measured riverwards from and perpendicular to the river side of Pilie street; at a point 94 feet south of the south side of Lafayette street, 424½ 188 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 20 feet north of the south side of Lafayette street, 162 feet, measured riverwards from and perpendicular to the lake side of Water street; at a point 47 feet north of the north side of Gravier street, 351 feet, measured riverwards from and perpendicular to the lake side of Delta street; at a point 3 feet south of the north side of Canal street, 280 feet, measured riverwards from and perpendicular to the lake side of North Water street; at a point 2 feet south of the south side of Customhouse street, 254 feet, measured riverwards from and perpendicular to the lake side of Wells street; at a point 102 feet south of

the south side of Bienville street, 198 feet, measured riverwards from and perpendicular to the lake side of North Water street; at a point 75 feet south of the south side of Conti street, 210 feet, measured riverwards from and perpendicular to the lake side of North Front street; at a point 42 feet south of the north side of Conti street, 168 feet, measured riverwards from and perpendicular to the lake side of North Front street; at a point 126 feet south of the south side of St. Louis street, 77 feet measured riverwards from and perpendicular to the lake side of North Front street; at a point 52 feet south of the south side of St. Louis street, 65 feet, measured riverwards from and perpendicular to the lake side of North Front street; at a point 19 feet north of the south side of St. Louis street, 60 feet, measured riverwards from and perpendicular to the lake side of North Front street; at a point 77 feet north of the north side of St. Louis street, 61 feet, measured riverwards from and perpendicular to the lake side of North Front street; at a point 115 feet south of the south side of Toulouse street, 112 feet, measured riverwards from and perpendicular to the lake side of Clay street; at a point 27 feet south of the south side of Toulouse street, 94 feet, measured riverwards from and perpendicular to the lake side of Clay street; at a point 15 feet north of the north side of Toulouse street, 81 feet, measured riverwards from and perpendicular to the lake side of Clay street; at a point 48 feet north of the north side of Toulouse street, 79 feet, measured riverwards from and perpendicular to the lake side of Clay street; at a point 105 feet north of the north side of St. Peter street, 98 feet, measured riverwards from and perpendicular to the lake side of Clay street; at a point 137 feet south of the south side of St. Ann street, 89 feet, measured riverwards from and perpendicular to the lake side of Clay street; at a point 60 feet south of the south side of St. Philip street, 98 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 12 feet south of the south side of St. Ann street, 89 feet, measured riverwards from and perpendicular to the lake side of Clay street; at a point 32 feet north of the north side of St. Ann street, 95 feet, measured riverwards from and perpendicular to the lake side of Clay street; at a point 150 feet north of the north side of St. Ann street, 99 feet, measured riverwards from and perpendicular to the lake side of Clay street; at a point 120 feet north of the north side of St. Philip street, 100 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 145 feet south of the south side of Ursuline street, 105 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 93 feet south of the south side of Ursuline street, 114 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 20 feet north of the south side of Hospital street, 147 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 75 feet north of the north side of Hospital street, 148 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 160 feet north of the north side of Hospital street, 152 feet, measured riverwards from and perpen-

dicular to the lake side of North Peters street; at a point 16 feet north of the south side of Barracks street, 151 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 30 feet north of the north side of Barracks street, 114 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 40 feet east of the west side of Esplanade avenue, 90 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 69 feet west of the west side of Elysian Fields avenue, 98 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 58 feet west of the east side of Elysian Fields avenue, 114 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 5 feet east of the east side of Elysian Fields avenue, 123 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 10 feet east of the east side of Mandeville street, 124 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 101 feet west of the west side of Spain street, 95 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 42 feet west of the west side of Lafayette avenue, 85 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 20 feet west of the east side of Lafayette avenue, 80 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 13 feet west of the east side of Port street, 27 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 4 feet west of the west side of St. Ferdinand street, 27 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 78 feet east of the east side of St. Ferdinand street, 30 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 226 feet east of the east side of St. Ferdinand street, 28 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 309 feet west of the west side of Montegut street, 27 feet, measured riverwards from and perpendicular to the lake side of North Peters street; at a point 5 feet west of the west side of Clouet street, 27 feet, measured riverwards from and perpendicular to the lake side of North Peters street; thence on trestle work on the outside of the levee, to Kentucky street; thence through Kentucky street to the south side of Florida avenue; thence from the intersection of Kentucky street and south side of Florida avenue, through the south side of Florida avenue to the intersection of Elysian Fields avenue; thence from the intersection of the south side of Florida avenue and Elysian Fields avenue through the south side of Marigny avenue to the intersection of Fortin street; thence from the intersection of the south side of Marigny avenue and Fortin street, through private property for a width of 60 feet, which the city of New Orleans shall acquire, to the east bank of Bayou St. John and across the said Bayou St. John; thence from the west bank of Bayou St. John, through Brooks street to the intersection of the said Brooks street and Iberville (formerly Custom-

house) street; thence from the intersection of Brooks street and Iberville (formerly Customhouse) street, through private property for a width of 60 feet, which the city of New Orleans shall acquire, to the intersection of Milne avenue and Taylor avenue; thence from the intersection of Milne avenue and Taylor avenue, through the said Milne avenue to the intersection of Milne avenue and Monroe avenue; thence from the intersection of Milne avenue and Monroe avenue, through Woodcock street to the east bank of the New Basin Canal, and across the said New Basin Canal; thence from the west bank of the New Basin Canal, through private property for a width of 60 feet, which the city of New Orleans shall acquire, to the east bank of Upper Line Canal; thence along the east bank of Upper Line Canal, to the intersection of Oleander street, the people of the city of New Orleans acquiring such private property as may be necessary to provide a right of way 60 feet wide; thence from the intersection of Oleander street and Upper Line Canal, through Upperline street and along the east side of Upper Protection Levee to the intersection of Hickory street; and thence from the intersection of Hickory street and Upper Line street, through Upper Line street and along the east side of Upper Protection Levee to the intersection of Leake avenue, the people of the city of New Orleans acquiring private property for a width of 40 feet from the said Hickory street to the said Leake avenue.

That if, for any reason or cause, it shall be found impossible, impracticable, or inadvisable, at any time prior to the construction of said public belt railway, to use any part of the dedication of the public belt double track railway reservation hereinabove made and set forth, said part of said reservation may be abandoned by said Public Belt Railroad Commission, and by and with the concurrence and approval of the Council of the City of New Orleans some other reservation may be dedicated and used in lieu of the part of said hereinabove described Public Belt Railroad Commission, or any part of the above described reservation, shall have no effect upon the dedication hereinabove made, except insofar as the part of said reservation so abandoned is concerned.

4240 That the dedication of the public belt double track railway reservation hereinabove made and set forth, in so far as said reservation may traverse, cross, intersect with or encroach upon territory under the jurisdiction of the Board of Commissioners of the Port of New Orleans, shall not become final until said dedication, in so far as said territory is concerned, shall be ratified and approved by said Board of Commissioners of the Port of New Orleans.

SEC. 5. That Section 4 of ordinance No. 147, N. C. S., adopted August 7, 1900, be and the same is hereby amended and re-enacted to read as follows, to-wit:

SEC. 4. That the Cromwell Steamship Company shall not be asked or required to remove its freight shed or depot until the belt railroad herein provided for is in course of construction and such removal is necessary to make room for said public belt railroad; the distance to which said structures are to be removed not to exceed 22 feet, exclusive of the overhanging shed; that in order that the Cromwell

Steamship Co. may not be deprived of the trackage facilities necessary for handling the business between its ships and the cars of the railway companies, the Public Belt Railway Commission is authorized and directed to make an exchange of tracks between Conti street and a point 131 feet south of St. Ann street with the Louisville and Nashville Railroad Company by means of switches and cross-over tracks, so that said belt railroad track may be used by the Louisville and Nashville Railroad Company next to the river and alongside said Cromwell freight shed, while the belt railroad within said limits shall use the second and third tracks from said shed, provided that the privilege of making said exchange of tracks shall be revocable at the pleasure of the Council.

SECTION 6. That section 5 of ordinance No. 147, N. C. S. adopted August 7, 1900, be and the same is hereby repealed.

SECTION 7. That section 8 of ordinance No. 147, N. C. S., adopted August 7, 1900, be and the same is hereby repealed.

SECTION 8. That section 9 of ordinance No. 147, N. C. S., adopted August 7, 1900, be and the same is hereby repealed.

424p SECTION 9. That a new section be added to Ordinance No. 147, N. C. S., adopted August 7, 1900, to be known as section 11, to read as follows to-wit:

SECTION 11: That there is hereby dedicated and appropriated to the Public Belt Railway Commission of the city of New Orleans for the purpose of acquiring by purchase or expropriation, such private property as may be needed to complete the public belt reservation hereinabove described, and for the purpose of owning, locating, maintaining and operating a double track public belt railway system on the public belt railroad reservation herein provided for, in the name of and for the benefit of the people of the city of New Orleans, the sum of ten thousand (\$10,000) dollars annually, out of the reserve funds of the years 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914 and 1915 said sum to be written by the Council of the city of New Orleans in the annual budgets of said years within the first twenty items of the reserve fund portion of the budget of expenditures of the city of New Orleans.

SECTION 9. That section 11 of ordinance No. 147, N. C. S., adopted August 7, 1900, be and the same is hereby repealed.

SECTION 10. That all ordinances or parts of Ordinances in conflict with the provisions of this ordinance be and the same are hereby repealed.

Adopted by the Council of the City of New Orleans, Oct. 4, 1904.

T. W. CAMPBELL,

Clerk of Council.

Approved October 8, 1904.

PAUL CAPDEVIELLE, *Mayor.*

A true copy:

L. A. HUBERT,

Secretary to the Mayor.

N. O., M'ch 23/09.

A true copy.

(Signed) W. P. BALL,
[SEAL.] *Sec'y to Mayor.*

(Endorsed:) "A 6." No. 79743. Div. C. Martin Behrmann et als. vs. La. Ry. & Nav. Co. Offered in evidence by Plfts. Filed April 19, 1909. (Signed) Jos. Garidel, D'y Cl'k.

425 EXHIBIT MARKED "A-7" (Ordinance No. 3556—N. C. S.).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

425a MAYORALTY OF NEW ORLEANS,
CITY HALL, March 7, 1906.

Calendar No. 5368.

No. 3556. New Council Series.

An Ordinance providing for credits with certain banks of the City of New Orleans, not to exceed in the aggregate the sum of one hundred thousand dollars, said credits to bear interest at the rate of five per centum per annum, and obligating the City of New Orleans to refund whatever amounts may be advanced by said banks, together with interest thereon.

SECTION 1. Whereas, the following named banks have agreed to provide credits for the City of New Orleans for Public Belt Railroad purposes in sums not to exceed the amounts set opposite their names, viz: Interstate Trust and Banking Co. \$32,000.00; State National Bank, \$15,000.00; Canal Louisiana Bank and Trust Co., \$15,000.00; Metropolitan Bank, \$5,000.00; Commercial-Germania Trust and Savings Bank, \$9,000.00; Commercial National Bank, \$3,000.00; Hibernia Bank and Trust Co., \$17,000.00; People's Savings, Trust and Banking Co., \$2,500.00; Colonial Bank and Trust Co., \$1,500; said sums aggregating \$100,000.00, provided the City of New Orleans obligates itself to refund to the several banks above named, said sums or such portions thereof as may be advanced by yearly payments out of the appropriations of \$10,000.00 each for the years 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914, and 1915, in an amount which the sums advanced by said banks bear in proportion to the said annual appropriation of \$10,000.00, provided further, that interest on said sums or whatever portions thereof be advanced be provided for at the rate of five per centum per annum until paid, and provided further, that said appropriations for the years 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914 and 1915 of \$10,000.00 each, with an amount sufficient for interest on principal be written within the first \$250,000.00 of

the Reserve Fund portion of the Budget of Expenditures of
425b the City of New Orleans of said years, the appropriation of
\$10,000.00 for 1906 having been so placed, together with
the sum of \$7,500.00 for interest, in the Reserve Fund portion of
the Budget of Expenditures of the year 1906, therefore.

SECTION 2. Be it Ordained by the Council of the City of New Orleans, That in order to secure the credits of \$100,000 above referred to, for Belt Railroad purposes, the City Council hereby pledges itself to place within the first \$250,000.00 of the Reserve Fund portion of the Budgets of Expenditures of the City of New Orleans of each of the years 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914 and 1915, the appropriation of \$10,000.00 each, provided for by Ordinance No. 2683, N. C. S., and an amount sufficient to pay whatever interest at the rate of five per centum shall be estimated to become due on the balance that may remain unpaid of the amounts advanced by said banks.

SECTION 3. That said sums shall be applied to the satisfaction of contracts to be made by the City of New Orleans in accordance with the provisions of the Charter of the City of New Orleans and laws of the State of Louisiana for the purposes of the Public Belt Railroad of the City of New Orleans, said sums to be actually paid by said banks to contractors to whom contracts for purposes of the Public Belt Railroad shall be awarded upon delivery by said contractors to said banks of the certificates of indebtedness to be issued by the City of New Orleans to said contractors under the authority of Act No. 32 of 1902; said certificates to stipulate the annual appropriations out of which they shall be paid, and said banks to make payments of said certificates without recourse thereon against the contractors, but against the City of New Orleans alone. Provided, however that certificates to contractors shall be so issued that each bank shall be only required to pay its proportionate share of the sum total of any contract or contracts as its credit bears to the total credits of all the banks, to-wit: \$100,000.00 unless otherwise arranged with any bank or banks when said bank or banks will pay the sum total of any one or more contracts, provided, said sums do not exceed the credit or credits held by said bank or banks as provided in section 1 of this ordinance.

SECTION 4. That the City of New Orleans hereby obligates and
425c binds itself to refund to said banks any and all amounts
advanced which said banks may pay to contractors under
the provisions of this ordinance, with interest at the rate of
five per centum per annum, out of the appropriation of \$17,500.00
made by Item No. — of the Reserve Fund of the Budget of the
City of New Orleans of the year 1906, and out of the annual appropriations of \$10,000.00 and interest to be made within the first
\$250,000.00 of the Reserve Fund of the years 1907, 1908, 1909,
1910, 1911, 1912, 1913, 1914 and 1915, respectively, the City of
New Orleans binding and obligating itself to place within the first
\$250,000.00 of the Reserve Funds of the years above referred to
the appropriations of \$10,000.00 each, and provide in advance for
interest on whatever principal may remain due by estimating and

writing in the Reserve Funds of the Budgets of the years above referred to, within the first \$250,000.00 of said Reserve Funds, and amount that will cover the interest from the date of the last payment of principal to the estimated date when the next annual appropriation should be paid.

SECTION 5. That the Comptroller of the City of New Orleans be and he is hereby authorized, empowered and directed to warrant on the treasurer for payment of said certificates out of the Reserve Fund portions of the Budgets of Expenditures of the City of New Orleans of the years 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914 and 1915, as soon as said funds are available to discharge the sums for the year written on the face of said certificates, and the Treasurer is hereby authorized empowered and directed to pay said warrant.

Adopted by the Council of the City of New Orleans March 6th, 1906.

T. W. CAMPBELL,

Clerk of the Council.

Approved March 7th, 1906.

MARTIN BEHRMAN, *Mayor.*

A true copy:

W. P. BALL,

Secretary to the Mayor.

N. O., Mch. 23/09.

A true copy:

[SEAL.] W. P. BALL,

Sec'y to Mayor.

[Endorsed:] "A 7." No. 79743. Div. "C." Martin Behrman et als. vs. La. Ry. & Nav. Co. Offered in evidence by Plaintiff. Filed April 19th, 1909. (Signed) Joe Garidel, d'y cl'k. Civil District Court. Apl. 16, 1909, paid. Thomas Connell, Clerk.

426 EXHIBIT MARKED "A-8" (Ordinance No. 4230—N. C. S.)

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

426a MAYORALTY OF NEW ORLEANS,
CITY HALL, Dec. 5, 1906.

Calendar No. 6122.

No. 4230, New Council Series.

An ordinance binding and obligating the City of New Orleans to make an appropriation to the aggregate amount of \$225,000.00 and interest, in the budgets of the years 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915, and 1916, for Public Belt Railroad purposes, and providing for the issuance of transferable certificates of indebtedness in satisfaction of contracts made according to law for Public Belt Railroad purposes to the aggregate amount of \$225,000.00, and providing for the payment of said certificates and interest.

Be it ordained by the Council of the City of New Orleans:

SECTION 1. That the City of New Orleans hereby binds and obligates itself to place in the alimony portion of the budgets of expenditures of the City of New Orleans of the years 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915 and 1916, appropriations for Public Belt Railroad purposes of \$25,000.00 for each of said years; said appropriations aggregating \$225,000.00 and the interest on said sum of \$225,000.00 at the rate of five per centum per annum for the year 1907, having already been appropriated in the budget of expenditures of the year 1907; the City of New Orleans hereby further binds and obligates itself to place in the alimony portion in each of the budgets of 1908, 1909, 1910, 1911, 1912, 1913, 1914, 1915 and 1916 the additional amount necessary to pay interest, at the rate of five per centum per annum on the sum of \$225,000.00 or on any balance of said sum which may remain unpaid; the amount to be annually appropriated for interest to be estimated from the date of the last payment of an annual appropriation of \$25,000.00 to the estimated date when the next annual appropriation of \$25,000.00 shall be paid.

Sec. 2. That the City of New Orleans hereby binds and obligates itself to pay to any contractor or contractors, or bank or banks, banking or trust companies, trustees, corporations, firms or persons who may hold certificates of indebtedness, the issuance of which is hereby authorized for Public Belt Railroad purposes, the amounts
426b of such certificates of indebtedness in principal and interest out of the aggregate appropriations of \$225,000.00, with interest, made by Section 1 of this Ordinance.

SEC. 3. That said certificates shall be issued under authority of Act 32 of 1902, in favor of any contractor or contractors to whom contracts for Public Belt Railroad purposes shall be awarded by the Council, in satisfaction of such contracts. Said certificates shall stipulate the special annual appropriations out of which they shall be paid and shall be transferable without recourse against any contractor or contractors or any subsequent holder thereof, but with recourse against the City of New Orleans, alone.

SEC. 4. That the Comptroller of the City of New Orleans be and he is hereby authorized, empowered and directed to warrant on the Treasurer for payment of said certificates in principal with interest thereon, from date of issue until paid out of appropriations of the years corresponding to those written on the face of said certificates as soon as the funds are available to discharge the same and the Treasurer be and he is hereby authorized, empowered and directed to pay said warrants.

Adopted by the Council of the City of New Orleans, Dec. 4, 1906.

T. W. CAMPBELL,

Clerk of the Council.

JAS. McRACKEN,

Acting Mayor.

Approved Dec. 5, 1906.

A true copy:

W. P. BALL,

Secretary to the Mayor.

N. O. Mch. 23/09.

A true copy.

[SEAL.]

(Signed) W. P. BALL,
Sec'y to Mayor.

[Endorsed:] "A 8." No. 79743. Div. "C." Martin Behrman et als, vs. La. Ry. & Nav. Co. Offered in evidence by Pl't'ff. Filed April 19th, 1909. (Signed) Joe Garidel, d'y cl'k. Civil District Court, Apr. 16, 1909. Paid. Thomas Connell, clerk.

427 EXHIBIT MARKED "A-9" (Copy of Resolution Adopted at Meeting Held August 12th, 1902).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

Copy.

Office of Board of Commissioners of the Port of New Orleans,
No. 337 Carondelet Street.

Resolved, That the Board of Commissioners of the Port of New Orleans, approve the dedication for the purpose of a public belt

railroad reservation — certain space on the river front between Toledano and Louisa Streets, as is defined in the Ordinance now before the Committee on Streets and Landings of the Council of the City of New Orleans, and referred to this body by said Committee for approval in so far as concerns the space of reservation within the jurisdiction of the Board of Commissioners of the Port of New Orleans; provided that the approval of the Board of Commissioners of the Port of New Orleans, to the dedication of said space within their jurisdiction for the purpose of a Public Belt Railroad Reservation, shall remain in force only so long as the public belt railroad is operated and controlled by a public commission in accordance with the provisions of Ordinance No. 147 N. C. S.; and provided further that the construction of said public belt railroad system shall be of such character of road bed and rails as will allow the paving between the tracks at the intersections of all streets from Toledano to Louisa streets, and shall be so constructed at all points on the river front where the said system shall encroach upon the present roadways existing on the river front and now used by vehicles; and provided further that it shall be unlawful to park cars at any point of said public belt railroad system, where the space between the outer rail of said tracks and the bulkhead of the wharf shall be less than thirty (30) feet.

428 I, Tiley S. McChesney, Asst. Secretary and Treasurer of the Board of Commissioners of the Port of New Orleans, hereby certify the above to be a true and correct copy of Resolution adopted by the Board of Commissioners of the Port of New Orleans at session held August 12th, 1902, as recorded in Minute Book No. 2, page 349.

[SEAL.]

(Signed)

TILEY S. MCCHESENEY,

Asst. Secretary & Treasurer.

* * * * *

EXHIBIT MARKED "A-10" (Copy of Resolution Adopted at Meeting Held January 17th, 1905).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

Copy.

Office Board of Commissioners of the Port of New Orleans.

NEW ORLEANS, LA., January 18, 1905.

Whereas, The Board of Commissioners for the Port of New Orleans, by resolution, passed August 12, 1902, did approve the dedication of certain space for a Public Belt Railroad reservation, under certain conditions and stipulations, for a Public Belt Railroad to be operated and controlled by a Commission in accordance with

the provisions of Ordinance No. 147, N. C. S., adopted by the Council of the City of New Orleans, August 7, 1900; and

Whereas, Said resolution of this Board has been sustained, by the decision of the Supreme Court of the State of Louisiana as a legal exercise of power by said Board; and

Whereas; Ordinance No. 147, N. C. S., has been altered and amended by Ordinance No. 2683 N. C. S., adopted by the Council of the City of New Orleans, October 4, 1904, and said amended ordinance is now submitted to this Board for ratification and approval thereof, be it

429 Resolved, That the Board of Commissioners for the Port of New Orleans, hereby reaffirm, under the same terms and conditions its resolution of said date of August 12, 1902, and therefore approves the dedication, for the purpose of a Public Belt Railroad reservation of space for the double tracks on the river front as defined in Ordinance No. 2683 N. C. S. in so far as same concerns the space or reservation within the jurisdiction of the Board of Commissioners for the Port of New Orleans provided that the approval of this Board shall remain in force only as long as the Public Belt Railroad is exclusively operated, managed and controlled by the Public Belt Railroad Commission, and that no rights or privileges are granted to any railroad company to control, manage and operate on said tracks, and provided further, that the construction of the Public Belt Railroad shall commence, within three months from this date, and shall be completed and in operation, in the space within the jurisdiction of this Board, not later than eighteen months, and that said Railroad tracks shall be the sole property of the City of New Orleans, at all times and under all circumstances, and shall not be leased or alienated, and provided further, that the construction of said Public Belt Railroad system shall be of such a character of road bed and rails as will allow the paving between the tracks at the intersection of all streets, within the jurisdiction of this Board, and shall be so constructed at all points on the river front where the said system shall encroach upon the present roadways existing on the river front, and now used by vehicles, and provided further that cars shall not be parked at any point on said Public Belt Railroad system where the space between the outer rail of such tracks and the bulkhead shall be less than thirty feet or in front of street intersections, and the cars shall not be parked and unreasonable time to interfere with the commerce of the river front; and provided further that no other property under the jurisdiction of this Board, outside of the space reserved for the double tracks, shall be used without the consent of

430 this Board.

I, Tiley S. McChesney, Asst. Secretary & Treasurer, of the Board of Commissioners of the Port of New Orleans, hereby certify that the foregoing is a correct copy of resolution adopted by the Board of Commissioners of the Port of New Orleans at

Session held January 17th, 1905, as recorded in Minute Book No. 3, page 347.

[SEAL.]

(Signed)

TILEY S. MCCHESENEY,
Ass't Secretary & Treasurer.

EXHIBIT MARKED "A-11" (Copy of Resolution Adopted by the Board of Commissioners of the Orleans Levee District, Dated June 17th, 1905).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19, 1909.

Board of Commissioners of the Orleans Levee District.

Room No. 15, Masonic Temple.

JUNE 17, 1905.

Mr. James W. Porch, President pro-tem., Public Belt Railroad Commission, 626 S. Peters St., City.

DEAR SIR: I beg to inform you that a special meeting of the Orleans Levee Board, held May 29th, 1905, after considering the application of Public Belt Railroad Commission, The Board adopted the following:—

"Whereupon it was moved by Mr. W. McL. Fayssoux, seconded by Mr. Peter Elizardi, that the application of the Public Belt Railroad Commission be granted and that the permission to lay tracks in accordance with blue prints of said applicant, submitted with said application and marked "Railroad Commission, May 17th, 1905," be and the same is hereby granted, said blue prints — and setting forth specially the grade and location of the proposed tracks on the Upper Protection Levee.

431 It was further moved that the approval of this Board shall remain in force and effect only so long as the Belt is exclusively controlled, operated and managed by the Public Belt Railroad Commission, and that no rights or privileges are granted any Railroad Company to control, manage and operate on said track, and provided further the said Belt Railroad shall be the sole property of the City of New Orleans at all times.

It was further moved that the said grant to the Public Belt of the privilege aforesaid is limited exclusively to the powers conferred by law upon this Board.

Your very truly,
(Signed)

T. J. DUGGAN, *Secretary.*

A true copy of minutes:

[SEAL.]

(Signed)

PETER E. MUNTZ, *Secretary.*

March 23rd. 1909.

432 EXHIBIT MARKED "A-12" (Copy of Resolution Adopted by the Board of Commissioners of Orleans Levee District, on 31st Day of March 1906).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19, 1909.

Copy.

Board of Commissioners, Orleans Levee District.

Room No. 15, Masonic Temple.

NEW ORLEANS, *March 31st, 1906.*

Public Belt Railroad Commission, City of New Orleans, Room 30, City Hall.

GENTLEMEN: I hereby certify that the following Resolution was unanimously adopted by the Board of Commissioners of the Orleans Levee District, at a meeting held this day:

Resolved: That as the Resolution of approval of the Board of Commissioners—Orleans Levee District—adopted at a special meeting held May 29th, 1905 was confined to the approval of certain space on the upper Protection Levee—to be used for Railroad Tracks—when the approval that was desired—was the approval of the use of certain space or reservation for a double railroad track as defined in Ordinance #2683 N. C. S. adopted by the Council of the City of New Orleans—Oct. 4th, 1904 organizing the Public Belt Railroad Commission for the City of New Orleans, wherever the said space or reservation is within the jurisdiction of the Orleans Levee Board—therefore the resolution adopted at the special meeting held May 29th, 1905, is hereby amended and reenacted, and the following approval is hereby adopted:

433 Whereas: The City of New Orleans by Ordinance #147 N. C. C adopted by the Council of the City of New Orleans, Aug. 7th, 1900 did organize a Public Belt Rail-road Board, which Ordinance has been altered and amended by Ordinance #2683 N. C. S. adopted by the Council Oct. 4th, 1904, organizing the Public Belt Rail-road Commission for the City of New Orleans, and

Whereas: The Public Belt Rail-road Commission for the City of New Orleans has applied to the Orleans Levee Board for the use of certain space for double railroad tracks as defined in said Ordinance #2683 N. C. S., wherever said space or reservation is within the jurisdiction of the New Orleans Levee Board and the said Public Belt Rail-road Commission has also requested to be permitted to use a portion of the Upper protection Levee, to lay tracks thereon, therefore be it

Resolved: That the Board of Commissioners Orleans Levee District hereby approves the dedication of certain space or reservation

for a Public Belt Rail-Way for the City of New Orleans, as defined in Ordinance #2683 N. O. S. wherever the said space or reservation is within the jurisdiction or may be changed to be within the jurisdiction of the Board of Commissioners, Orleans Levee District and also allows the use of a portion of the Upper Protection Levee for Rail-Road tracks, in accordance with blue-prints furnished by said Public Belt Rail-Road Commission and marked "Commission May 17th, 1905—said blue prints, detailing and setting forth specifically the grade and location of the proposed tracks on the Upper Protection Levee but the approval of the use of space or reservation,

434 wherever the said space or reservation is within the jurisdiction of the Board of Commissioners, Orleans Levee District,—is under the following terms, stipulations and reservations—That this approval shall remain in force and have effect only as long as the Public Belt Railroad shall be exclusively operated, managed, and controlled by the Belt Railroad Commission, and that the management and control of the Public Belt Rail-Road shall be separate and distinct from that of any Rail-Road entering the City of New Orleans, and no employee, director, or officer of any State or Interstate Rail-Road shall be employed by or allowed to act as director, Commissioner, or Manager of the Public Belt Rail-Road and that no rights or privileges are granted to any Rail-road Co. to control, manage and operate on said tracks, and that all said tracks shall be and remain the sole property of the City of New Orleans at all times and under all circumstances, and shall be constructed on the River Front within two years hereafter and shall not be leased or alienated:

Provided Further: That no other property under the jurisdiction of the Orleans Levee Board outside of the space reserved or used for the double tracks, shall be used without the Consent of the Board, and the Violation of any of the above stipulations shall ipso facto determine and annul all of the rights and privileges granted to the Public Belt Rail-Road Commission of the City of New Orleans.

Very truly,

T. J. DUGGAN,

Secretary Orleans Levee Board.

A true copy of minutes:

[SEAL.]

(Signed)

PETER E. MUNTZ, *Secretary.*

N. O., March 23rd. 1909.

434½

Duplicate.

Interstate Trust & Banking Company.

Capital and Surplus Over One Million Dollars.

Robert J. Wood, Chairman of the Board.

Lynn J. Dinkins, President.

John Dibert, Vice President.

Sam Henderson, Jr., Vice President.

Charles E. Novel, Ass't Cashier.

Henry M. Young, Sec. & Trust Officer.

P. M. Lamberton, Ass't Secretary.

NEW ORLEANS, Nov. 10, 1905.

Hon. Martin Behrman, Mayor, New Orleans, La.

DEAR SIR: There have been deposited with us this day for account of the Louisiana Railway and Navigation Company, fifty (50) State of Louisiana 4% Bonds for one thousand dollars (\$1,000) each, exceeding in value fifty thousand dollars (\$50,000) to be held in escrow subject to the terms and conditions of Paragraph C. of Section 3 of Ordinance 1997 N. C. S. approved by the Mayor Sept. 4, 1903.

INTERSTATE TRUST & BANKING
COMPANY,

Fiscal Agent of the City of New Orleans,

(Signed) By HENRY M. YOUNG, *Trust Officer.*

It is agreed between counsel for appellant and counsel for appellee in the case of Martin Behrman, Mayor, vs. La. Ry. & Nav. Co. that the foregoing copy of letter from the Interstate Trust & Banking Co. to Hon. Martin Behrman, Mayor, dated Nov. 10, 1905, the original of which was filed in evidence on the trial hereof as Exhibit 13, but which original has been mislaid, is a true and correct copy of said original, entitled to the same authority as the original and that said copy may be filed with and form part of the transcript now in the Supreme Court.

New Orleans, Nov. 22, 1909.

(Signed)

FOSTER, MILLING & GODCHAUX,

Att'ys for La. Ry & Nav. Co., App't.

H. G. DUPRE, *Att'y for Appellee.*

Written across face of letter "Duplicate."

435 EXHIBIT MARKED "A-14" (Copy of Agreement Between Belt Railroad Commission and Louisiana Railway & Nav. Co.).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

Whereas Certain rights and franchise were granted to the Louisiana Railway & Navigation Company, under an Ordinance of the Council of the City of New Orleans, No. 1997 N. C. S., The Mayor of the City of New Orleans, acting in his capacity as Mayor and ex-officio President of the Public Belt Railroad Commission of the City of New Orleans, instituted suit against the Louisiana Railway & Navigation Company, seeking to have declared null that portion of the ordinance containing the grant of the right of way over the Public Belt reservation, said suit being numbered #79743 on the docket of the Civil District Court for the Parish of Orleans, Division "C." All attempts to compromise said litigation having failed, and the Public Belt having constructed its double tracks along the River Front pending this litigation, and it being to the interest of both parties that the Public Belt should handle the cars of the Louisiana Railway & Navigation Company,—

The following agreement is entered into by the parties to said litigation and the Public Belt Railroad Commission of the City of New Orleans, viz:

First. The Belt Railroad Commission agrees to construct the proper interchange tracks to connect with the tracks of the Louisiana Railway & Navigation Company at Upper Protection Levee.

Second. The connection at Upper Protection Levee is only temporary, for in contemplation of the Belt Railroad authorities it is intended that the Belt Railroad which now reaches upper Protection Levee will be extended along the edge of said levee until it reaches the tracks of the Louisiana Railway & Navigation Company at Forshey and Oleander Streets, and when the Belt is completed to this point it is agreed that the Louisiana Railway & Navigation

Company shall have authority to connect its tracks with the
436 Belt Railroad interchange tracks at this intersection.

Third. The Public Belt Railroad Commission of the City of New Orleans agrees to receive the cars coming off the track of the Louisiana Railway & Navigation Company; to handle them with dispatch and return them promptly, and accord prompt and efficient service, the same and equal service as is accorded to other roads.

Fourth. The Public Belt Railroad Commission of the City of New Orleans agrees to switch the cars coming off of the tracks of the Louisiana Railway & Navigation Company, under the same rules and conditions as apply to all other roads.

Fifth. The Public Belt Railroad Commission of the City of New Orleans shall receive the cars of the Louisiana Railway & Navigation Company at the interchange at upper Protection Levee, as

aforesaid; shall handle all cars; carry them to their destination, and return them when loaded or unloaded to the Louisiana Railway & Navigation Company, at said point, at the uniform charge of \$2.00 per car, or such other uniform charge as may be hereafter legally fixed. The Louisiana Railway & Navigation Company in the interchange of traffic between the said Company and the Public Belt Railroad, shall make no greater charge for switching over its tracks within the city limits, than the switching charge of the Public Belt Railroad.

Sixth. This agreement is entered into temporarily, and shall continue until the law suit above referred to is finally disposed of or until it is dissolved by either party after ten days notices, and it is distinctly agreed and understood that this agreement shall in no manner affect the right of either litigant in the above law suit, nor the rights of any of the parties under Ordinances 1615 N. C. S., and 1997 N. C. S., passed by the City Council of the City of New Orleans.

Agreed to and signed in duplicate at New Orleans, this 25th day of August, 1908.

(Signed)

MARTIN BEHRMAN,
*Mayor and Ex-officio President Public
Belt Railroad Commission.*

(Signed)

LOUISIANA RAILWAY & NAV. —,
WM. EDENBORN, *President.*

A true copy:

(Signed) FRANK V. JOUBERT, *Secretary.*

3/23/09.

437 EXHIBIT MARKED "A-15" (Copy of Letter Dated N. O., March 10th, 1909, Written by F. F. Haddix, Agent of La. Railway & Navigation Co.).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19, 1909.

437a

"A-15."

MONDAY, March 22, 1909.

General Praise for Public Belt.

Even the Railroads Joining in the Great Chorus.

Now Recognizing the Vast Benefit to Commerce.

Provided by Municipally Owned and Managed Facility.

Freight Reaches Ship's Side on Day of Arrival, and Trade Is Fostered.

At the last meeting of the Belt Commission quite a number of very complimentary letters from business firms saying very pleasant things about the operation of the Public Belt were read, and as such things speak better for themselves, they are here given:

NEW ORLEANS, LA., *March 8, 1909.*

Mr. G. R. Davis, Public Belt Railroad.

DEAR SIR: We take pleasure in expressing our appreciation and satisfaction in the prompt manner in which the car of slate for us was handled by you, the car being placed on your track Saturday March 6, we completed loading same at noon of same day, and Monday morning at 9 o'clock March 8, we were unloading same in our yard. Thanking you and Mr. Phelps very much for your kindness and courteous manner, we remain,

GEIER BROS. BUILDING AND
MANUFACTURING COMPANY, LTD.,
Per GEO. GEIER, *President.*

NEW ORLEANS, *March 10, 1909.*

Mr. A. S. Phelps, Superintendent Public Belt Railroad, City.

DEAR SIR: You will note by referring to the memoranda attached that this line delivered you more cars in switch service, month of January, than any of the New Orleans lines, and we stood second in December, and I am satisfied that we stand first on the list, month of February, as we paid \$1,104 for February switching.

437b We would like to take this occasion to express our appreciation of the service that you have been giving us for the past sixty days. Will state our business has been handled very satisfactorily by the Public Belt, and our officials, as well as myself, personally appreciate the effort you have put forth that brought about this good service. You have enabled us in quite a number of cases to make delivery to steamers on some of our cars within twenty-four hours after the arrival through your tracks on the front.

Yours truly,

F. F. HADDIX, *Agent.*NEW ORLEANS, LA., *March 11, 1909.*

Superintendent Phelps, Public Belt Railroad.

DEAR SIR: Referring to the exceptional quick dispatch of placing the following eight empty cars at Celeste and Winn Streets to load the special consignments of import merchandise exported steamship Oxonian. Morgan's Louisiana and Texas 33,447, 33,408; Central Pacific, 83,007; Southern Pacific, 85,350, 86,423, 84,523, 89,111; Houston Central, 11,282. In connection I desire to acknowledge appreciation for the strict attention extended to the continued prompt placing of import empties and export loaded cars from this company to your road.

The stated eight empty cars were ordered at 5 p. m. March 8, 1909, and were promptly and properly placed at stated section by crew of Engine No. 5 in driving rain at 8 a. m. March 9, 1909.

This dispatch only assures us that we can safely rely upon your valued self and representatives to assist us to expedite movements of our import and export transactions executed on the upper and lower

Belt. Therefore, in the name of the agency, I wish to thank you, and only hope for the continuance of such interest.

Yours truly,

T. M. BARRET, *Ass't Ag't.*
SELPH.

MARCH 17, 1909.

A. G. Phelps, Esq., Superintendent Public Belt Railroad, City.

DEAR SIR: It gives me great pleasure to express my appreciation for the promptness in which the Public Belt handles Texas and Pacific business to and from the Morgan Line. The prompt
437c service given enables us to get cars loaded at the Morgan sheds out in trains of the same date. This speaks highly for the prompt service given by the Public Belt to its patrons.

As one who has a great deal of business with the Public Belt, I take this method of returning thanks for courtesies extended me by employes, and for the prompt handling of all Texas and Pacific business given them.

Yours respectfully,

C. L. BATTURS,
Freight Agent.

NEW ORLEANS, LA., March 17, 1909.

Mr. Phelps, Suprcintendent Public Belt Railway, New Orleans, La.

DEAR MR. PHELPS: We beg to thank you for your arrangement in giving us an extra pull at our wharf during the last few days when we were so badly crowded, and beg to assure you of our appreciation of your assistance.

Writing epitaphs on tombstones is not as satisfactory as handing bouquets, and as you may be pleased to know that the writer has been thoroughly satisfied with the services of the Public Belt at our wharf, I take pleasure in openly saying so.

Yours very truly,

E. NATHAN.

NEW ORLEANS, March 18, 1909.

Mr. A. S. Phelps, Superintendent Public Belt Railroad, New Orleans, La.

DEAR SIR: Referring to the five carloads of timber which we ordered out to the Leyland Line city front wharf for Liverpool on Feb. 25, and our request to your office to have these cars placed promptly in order to catch the steamer we wish to take this occasion to thank you for the promptness with which these cars were handled. We ordered them out on the afternoon of the 25th, and they were placed on the Leyland Line wharf on the 27th. This promptness saved our shipper considerable money, as it was very important that the cars go forward on this boat.

While on this subject we take pleasure in stating that the service we are now getting over the Public Belt Railroad is very
437d good, and puts us in a position to handle export freight with

a great deal quicker dispatch than heretofore, which is a consequent saving to both us and the shipper.

Yours truly,

M. EASTMAN FORWARDING COMPANY,
By M. EASTMAN.

NEW ORLEANS, LA., *March 18, 1909.*

Mr. A. S. Phelps, Superintendent Public Belt Railroad, New Orleans, La.

DEAR SIR: On looking over our shipping account for this season we find that we have handled between two hundred and fifty and three hundred cars on the Public Belt since the 15th day of November, and we would like to say that we are more than pleased at the way the cars have been handled by the Belt Road. Notwithstanding the crowded condition of the city front, all cars handled since the 1st of January have been placed at an average time of less than thirty-six hours from date of orders.

Under these circumstances we feel called on to express our thanks to the management of the road not only for the promptness with which orders have been executed, but for the unfailing courtesy of the employees with whom we have come in contact.

Feeling confident that the coming year will witness greatly extended facilities for handling the expected increase in business during the coming year, and trusting that our expectations may be realized, we remain,

Very truly yours,

H. DA PONTE & CO.

NEW ORLEANS, LA., *March 18, 1909.*

Mr. A. S. Phelps, Superintendent Public Belt Railroad, City.

DEAR SIR: We beg to say that we have during the last few months been handling a considerable amount of pitch pine lumber and timber over the Public Belt Railroad, and we desire to convey to you that these shipments have been handled in a very satisfactory manner, especially lately, when your service on our cars has been remarkably prompt. We have felt from the beginning, and think so all the more strongly now, that the Public Belt is destined to become a great factor in facilitating and handling the export trade of New Orleans, and in our opinion, when carried out to its proper end, that is, with all the improvements and additional wharf facilities that are contemplated, especially for lumber, will work a revolution of this trade, and enable New Orleans to handle the large proportion of that business which rightfully belongs to it. The writer has had experience here on the river front for years back, as well as at other shipping points, therefore is in a position to compare the facilities here with what they have been and what they are elsewhere, and we are glad to say that there certainly is a vast improvement.

We expect to do a large business over your road, and will be glad to co-operate with you, and do anything we can to facilitate your

work for the port and its export interest at any time. Thanking you for your good service, we are yours truly,

FRED O. HOWE & CO.

[Endorsed:] A 15. #79743. Div. C. Behrman vs. La. R. & N. Co. Offered in Evidence by Plaintiff. Filed April 19th 1909. (Signed) Joe Garidel, d'y cl'k. Paid, Apl. 16, 1909. Civil District Court, Thomas Connell, clerk.

438 EXHIBIT MARKED "A-22" (Statement of the Cost of Main and Switch Tracks Between Henderson Street and the Upper Parish Line).

Offered in Evidence by Counsel for Plaintiff.

Filed April, 1909.

Celeste Switch:

Labor	\$638.22	
Material	2,030.19	
		<u>\$2,668.41</u>

Eighth-Harmony Shed:

Labor	274.12	
Material	1,314.08	
		<u>1,588.20</u>

Toledano Switch:

Labor	233.21	
Material	1,051.46	
		<u>1,284.67</u>

Wharf Tracks (Old Main Line bet. St.

Andrew & Toledano	14,000.00
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\$19,541.28

Main Line:

Labor	43,000.00
Material	68,000.00

\$111,000.00

3,700.00

\$107,300.00

Labor	\$22,000.00
Material	19,000.00
"	5,000.00

\$24,000.00

\$46,000.00

14,000.00

\$32,000.00

61,300.00

\$93,300.00

Toledano to Henderson

" " Upperline Pro.
Line Park.

Henderson to Upper Pro. Line
Park.

(Here follows Exhibit Marked "A-23," marked pages 439 and 439a.)

from August 18th, 1908, to February 28th, 1909, and Percentage of same). Offered in Evidence by Counsel for Plaintiff. Filed April 19th, 1909.

Earnings from August 18th, 1908, to February 28th, 1909, and Percentage of Same.

Interline Switching.

Aug.	Sept	Oct	Nov.	Dec.	Jan.	Feb.	Total.	No. cars.	Percent
368.00	844.00	1,060.00	1,098.00	1,130.00	972.00	1,128.00	6,600.00	3,300	29 1
240.00	438.00	612.00	790.00	718.00	704.00	644.00	4,146.00	2,073	18 3
26.00	102.00	272.00	550.00	852.00	1,040.00	1,104.00	3,946.00	1,973	17 5
214.00	234.00	332.00	370.00	548.00	488.00	448.00	2,634.00	1,317	11 6
108.00	248.00	350.00	428.00	368.00	344.00	340.00	2,186.00	1,093	09 6
380.00	208.00	164.00	202.00	364.00	386.00	330.00	2,034.00	1,017	09
52.00	74.00	136.00	102.00	174.00	176.00	262.00	976.00	488	04 3
10.00	6.00	10.00	12.00	18.00	8.00	28.00	92.00	46	00 4
6.00	6.00	4.00	.....	4.00	30.00	2.00	52.00	26	00 2
1,404.00	\$2,160.00	\$2,940.00	\$3,552.00	\$4,176.00	\$4,148.00	\$4,286.00	\$22,666.00	11,333	100

Local Switching.

.....	1,078.00	4,058.00	3,412.00	3,904.00	4,550.00	1,074.00	18,076.00	9,036	98 3
.....	.....	.....	.....	70.00	.....	.....	70.00	35	00 4
26.00	24.00	8.00	42.00	48.00	52.00	46.00	246.00	123	01 3
26.00	1,102.00	4,066.00	3,454.00	4,022.00	4,602.00	1,120.00	18,392.00	9,196	100

Car Service.

136.00	67.00	287.00	637.00	751.00	288.00	2,166.00
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Miscellaneous Income.

3.00	3.00	6.00
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I certify the above to be Correct.
(Signed) FRANK F. JOUBERT,
Secretary.

	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.	Total.
Eighth Harmony Landing.....	132	125	283	236	263	318	234	1591
Leyland Line.....	198	241	235	346	366	294	479	2159
N. Y. & P. R. R. S/S Co. Landing.....	26	64	57	46	36	63	27	319
Morgan Line.....	18	132	165	146	93	78	71	703
Harrison Line.....	32	32	52	160	237	238	196	947
Mandeville Street.....	72	141	125	114	67	102	115	736
So. Atlantic S/S Line.....	..	2	12	..	..	11	..	25
Picayune Tier.....	3	..	..	..	5	1	..	9
St. Andrew to Third (Export).....	4	6	31	..	..	117	170	328
Third to Seventh.....	19	2	..	..	..	..	..	21
Eighth to Ninth.....	24	23	..	..	..	..	..	47
Tchoupitoulas.....	..	..	183	237	429	289	241	1379
Conti Street.....	2	30	26	74	86	67	32	317
Harmony & Pleasant Team Track.....	14	50	..	..	..	..	..	64
Pleasant & Toledano.....	37	..	..	..	..	..	..	37
Seventh & Pleasant.....	15	4	..	..	..	..	..	19
Montegut.....	6	12	..	..	..	..	..	18
Lafayette Street.....	18	36	43	25	21	22	21	186
Second Street.....	3	..	..	..	..	1	..	4
Mandeville Street.....	..	3	..	..	..	..	..	3
Celeste Street.....	3	..	..	..	..	..	..	3
Hospital Street.....	..	..	..	..	..	..	..	..
Canal to Poydras (Main Line).....	2	3	2	22	60	..	50	132
Lafayette Avenue.....	..	1	..	1	..	..	..	8
Espanade Avenue.....	2	1	..	..	..	..	..	1
Napoleon Avenue.....	4	10	..	1	..	..	..	3
Philip and Soraparu Main Line.....	3	5	..	..	..	..	..	15
								8

Toulouse and Dumaine	"	4	..	1	..	2	..	4	..	5
Millaudon	"	1	1	1	1	2	4	1	10	
Louisa Street	"	..	1	3	1	1	..	..	5	
Marigny and Port	"	..	1	1	..	..	..	..	2	
Mazant Street	"	..	..	3	..	3	..	..	6	
North E. Fruit Wharf	..	2	..	..	..	..	..	..	2	
Company Material	..	8	4	3	3	3	..	..	22	
Central Station	..	..	..	..	..	..	48	..	48	
Louisa Street Switch	..	..	..	..	..	..	1	6	7	
<hr/>										
Total Direct Interchange		644	935	1221	1420	1672	1654	1643	9189	
									2119	
									11308	
<hr/>										
Undistributed		..	..	..	..	..	..	..	25	
Total Orders		..	..	..	..	..	..	..	11333	

I certify the above to be Correct.
(Signed)

FRANK F. JOUBERT,
Secretary.

[Endorsed:] A 23, 79743, Div. C. Martin Behrman vs. La. R. & N. Co. Offered in Evidence by Plaintiff. Filed April 19th, 1909. Signed Joe Garidel, d'y cl'k. Paid April 16, 1909. Civil District Court. Thomas Connell, Clerk.

Exhibit Marked "A-24" (Statement Showing Track Percentage of Business Done from August, 1908, to April 19th, 1909.)

440 EXHIBIT MARKED "A-24" (Statement Showing Track Percentage of Business Done from August, 1908, to February, 1909). Offered in Evidence by Counsel for Plaintiff. Filed April 19th, 1909.

Track Percentage of Business Done from August, 1908, to February, 1909.

440a

	Aug.	Sept.	Oct.	Nov.	Dec.	Jan.	Feb.
Eighth Harmony Landing	.2050	.1300	.2310	.1661	.1573	.1922	.1425
Leyland Line	.3070	.2581	.1920	.2430	.2189	.1777	.2915
N. Y. & P. R. Co. S. S.	.0404	.0750	.0467	.0320	.0215	.0388	.0164
Morgan Line	.0280	.1400	.1350	.1030	.0556	.0471	.0432
Harrison Line	.0500	.0350	.0426	.1120	.1418	.1438	.1193
Mandeville St.	.1120	.1500	.1023	.0833	.0400	.0616	.0700
St. Andrew to Third Export	.0060	.0064	.0253	.....	.....	.0707	.1034
Third to Seventh	.0360	.....	.....	.....	.....	.....	.....
Eighth to Ninth	.0370	.....	.....	.....	.0514	.0405	.0195
Conti Street Team Track	.0030	.0321	.0210	.0520	.....	.....	.....
Harmony & Pleasant Team Track	.0210	.0530	.....	.....	.....	.....	.....
Pleasant & Toledano	.0570	.....	.....	.....	.....	.....	.....
Montegut	.0093	.0128	.....	.....	.....	.....	.....
Seventh & Eighth	.0120	.....	.....	.....	.....	.....	.....
Lafayette	.0220	.0385	.0353	.0176	.0125	.0126	.0128
Seventh & Pleasant	.0093	.0010	.....	.....	.....	.....	.....
Second Street	.0045	.....	.....	.....	.....	.....	.....
Picayune Tier	.0045	.....	.....	.....	.....	.0031	.0006
Seventh & Toledano Team Track	.0015	.....	.....	.....	.....	.....	.....
Northeastern Fruit Wharf	.0030	.....	.....	.....	.....	.....	.....
Foot of Canal Street	.0030	.0021	.....	.....	.....	.....	.....
Lafayette & N. Peters	.0015	.....	.....	.....	.....	.....	.....
Eplanade Avenue	.0030	.0010	.....	.....	.....	.....	.....
Napoleon Avenue	.0015	.0032	.....	.....	.....	.....	.....

441 EXHIBIT MARKED "O-1" (Official Report of Port Investigation Commission).

Offered by Plaintiff to be Annexed to a Bill of Exceptions.

Filed April 19th, 1909.

441a EXHIBIT MARKED "O-1" (Official Report of Port Investigation Commission).

Offered by Plaintiff to be Annexed to a Bill of Exceptions.

Filed April 19th, 1909.

Report of the Joint Committee of the Senate and House of the State of Louisiana, Appointed to Investigate the Port of New Orleans.

C. C. Cordill, Chairman Joint Committee.

NEW ORLEANS, May 13, 1908.

To the Senate and House of Representatives:

The joint committee of the Senate and House of Representatives appointed pursuant to concurrent resolution adopted November 20, 1907, submits the following:

The resolution directed the commission to examine into pilotage charges, towage charges, demurrage charges, dock and wharf charges, railroad and steamship freight rates, charges and regulations, labor charges and regulations, and all other charges and regulations affecting the cost and moving of merchandise and import and export business at the port of New Orleans, whether made or imposed by persons, firms, associations or corporations."

The commission organized on December 16, 1907. Senators C. C. Cordill and Thomas C. Barret, and Representatives R. Swords Lee, Fritz Salmen and George H. Terriberry being present.

Senator C. C. Cordill was elected chairman; Thomas C. Barret, Vice-chairman, Gustaf R. Westfeldt, Jr. Secretary; E. L. Chappuis, Accountant; Allan R. Beary, stenographer; J. M. Oge, process server; Thomas Ryan sergeant-at-arms; W. S. Parkerson attorney, and Samuel L. Gilmore, associate counsel.

In order to appreciate the physical advantages and disadvantages of the port of New Orleans and to better Judge thereof, the commission decided to visit the other ports of the Gulf and South Atlantic, and for that purpose were at the port of Galveston January 9, 10 and 11, 1908. The commission made a thorough

441b and complete inspection of all the physical conditions, and examined a great number of witnesses as to the customs and charges.

On February 4, 5, 7, 8 and 9, 1908 the commission having still

the same object in view, visited Savannah, Pensacola and Mobile, and at each place made a thorough inspection of the physical conditions and examined many witnesses as to customs and charges.

On February 17, 1908, the commission began its public hearing in the City of New Orleans, and closed them on the 5th day of May, 1908, holding fifty-two (52) sessions and examining a vast number of witnesses on every possible phase of the subject to which its attention had been directed.

In furtherance of the objects of its creation, it also made a physical inspection of the conditions of the port of New Orleans, both from the water and land sides, and made a trip to the jetties, going out to sea through both the South Pass and the South-west Pass.

The commission found that, whereas South Pass has width of six hundred (600) feet between the walls of the jetties, and a narrow channel of one hundred (100) feet, with a depth of about twenty-nine (29) to thirty (30) feet, Southwest Pass has a width of thirty-six hundred (3,600) feet between the walls of the jetties, and will have a channel of six hundred feet in width with a depth of thirty-five feet, so that it will afford to New Orleans the easiest and safest approach of any harbor in the world.

A complete digest of the testimony taken cannot be presented within the limits of a reasonable report, and it will be utterly impossible to present an outline of any considerable portion of the evidence.

The Commission will content itself with finding the facts and so reporting them, trusting in this way to satisfy all the requirements of its appointment.

Pilotage Charges.

The Commission found that a dual system of pilotage exists for the port of New Orleans.

441c The bar pilots, located at the jetties, consist of some thirty men, associated in an organization of which Captain Ben Michel is president. These pilots have an equipment of three steamboats and other small craft, with a station at the Passes and one at Pilot Town, thoroughly furnished in every particular.

It is now and has been for many years the custom of the bar pilots to bring ships from the sea through the jetties to the head of the passes, and take them from the head of the — through the jetties to the sea.

For their services they receive \$4.50 per foot.

The annual income of these pilots is in the neighborhood of one hundred and sixty-five — (165,000) dollars; their expenses, allowing the highest claim made by them, amount to sixty thousand (60,000) dollars per annum, so that they have about one hundred and five thousand (105,000) dollars to be divided among thirty men, or, say thirty-five hundred dollars per year.

Just as it has been the custom of the bar pilots to operate between the head- of the passes and the sea, so it has been for many years

the custom of the river pilots to operate between the head- of the passes and the City of New Orleans.

This is an association which takes ships from the bar pilots at the head- of the passes and brings them to the city front or takes them at the City front, and turns them over to the bar pilots at the head- of the passes.

It consists of twenty-three men, who get an average of one dollar per foot for the service performed, and the total gross income for the year 1907 was forty-one thousand, five hundred and sixty-five (41,565.00) dollars, less nine thousand dollars for expenses, or about one hundred and thirty-five dollars per month each.

In the past, when the work at the passes was most arduous and attended with some degree of danger, the charge of \$4.50 per foot had abundant justification, but it has less now; and, when Southwest Pass is open, it will have still less and should be lowered.

The service from the head- of the passes to the City front is a most trying and arduous undertaking, and the charge of 441d one dollar per foot is not excessive and should not be disturbed.

The Commission recommends that the bar pilots' charge be fixed at four (4.00) dollars per foot, and that the river pilots' charge be fixed at one (1.00) dollar per foot.

It is the consensus of opinion that one service from the sea to the city, a distance of more than one hundred miles, requiring the continuous service under adverse conditions of fog and other dangers, is not desirable, and that the best results can be obtained from the present dual system, provided that the river pilots can be legalized.

With that object in view, the Commission recommends to the Legislature the enactment of a bill legalizing the presently licensed river pilots.

That the service of both sets of pilots is very efficient there can be no doubt. All of the witnesses so testified, and the Commission was satisfied of that fact from its own examination.

Cotton Seed By-Products.

The Commission finds that at Galveston, there is little or no charge made for the inspection and weighing of cotton seed meal and cake; and that, if any inspection and weighing is done, it is of a very small proportion of such shipments or cargo; whereas, in the port of New Orleans, the Commission finds that, up to within very recent times, the trade was content to weigh and inspect not more than ten per cent of such cargo; but that they are now actually weighing and inspecting, or pretending to weigh and inspect, and charging therefor, the entire receipts of cotton seed meal and cake at the Port of New Orleans.

The Commission finds that this adds an unnecessary cost upon all such commerce, especially inasmuch as the facilities at the various cotton mills tributary to New Orleans, having improved and modern machinery, the legal analysis is plentifully guaranteed by the statements and invoices.

The Commission recom-ends that the Railroad Commission of Louisiana adopt such rules and regulations as will require all railroads to furnish ample facilities for the grinding sacking and handling of cotton seed by products.

441e Towage Charges.

The charges are not greater for a single service at New Orleans than elsewhere, but they are excessive owing to the fact that at New Orleans the ship has to do a great deal of shifting to get a full cargo.

From Chalmette to Westwego, to the City Front and to Stuyvesant Docks, then back again to the City Front, she may have to be towed often as high as a dozen times, and each time the service is separate and subject to a separate charge.

It is hoped that this will be remedied in three ways:

First, by the establishment of a lighterage system, by means of which cargo may be carried to the ship instead of the ship being towed from place to place to pick up parts of cargo.

Second, by the operation of the public belt railroad, by means of which a ship's cargo could be more readily brought to her berth; and,

Third, by the widening of the wharves so that more cargo may be placed alongside of the ship.

Unquestionably the combination of the three will enable a great ship to tie up at her berth and there remain until she is loaded and ready for sea.

Demurrage Charges.

The Commission finds that, owing to the lack of facilities such as those just mentioned, demurrage charges at the port of New Orleans are heavy, but it suggests that the remedy is the same.

Quick despatch is what all demand and quick despatch can only be had by the ability to concentrate cargo, and concentration of cargo is dependent on wider wharves, the belt railroad, and lighterage.

Dock and Wharf Charges.

Under this head the Board of Commissioners of the port of New Orleans necessarily and primarily comes.

The Commission went thoroughly into this subject, inspecting the work and examining the officers.

441f The history of this Board is well known, and it would be a work of supererogation to recite it.

Suffice it to say that it owes its existence and operation to acts of the Legislature.

It has performed its work well and faithfully, and with the limited amount of money and its command it is wonderful what results have been accomplished.

The legislature of the year 1904 authorized the Board to issue two million dollars' worth of bonds. It issued seven hundred and

fifty thousand dollars' worth, when, owing to the fact of an adverse opinion expressed by an attorney, only one bid was received; and to that bidder the bonds were sold and delivered on March 1, 1905, but it has never since been able to dispose of any others, and those issued have always rested under the blight of that adverse opinion.

In order to do the work which has been done, the Board has been obliged to borrow money from the several steamship companies doing business at the port repaying the loans out of the receipts.

Every port to which ships sail from the port of New Orleans has spent and is spending millions upon millions of dollars in the improvement of the dock facilities, notably Antwerp, Bremen, Havre and Liverpool, and New Orleans should do likewise as she is to hold her place in the onward march.

The Commission recommends the submission to the people of the State of a Constitutional amendment, providing for the issuance of three million five hundred thousand (3,500,000) dollars of bonds, for this purpose.

The Board has pursued the policy of making long, narrow wharves, but this could not have been avoided owing to the fact that, until recently, the space of wider wharves was not available.

It has been made perfectly clear to the Commission that, instead of wharves varying from sixty to one hundred and fifty feet in width, there should be wharves of a uniform width of two hundred feet at the least, in order that ships may handle cargo with the greatest despatch and at the least cost.

441g The Commission finds the dock and wharf charges not more than sufficient to meet conditions and that they do not divert trade from the port.

Railroad and Steamship Freight Rates, Charges and Regulations.

The Commission has not found that this subject is one that militates against the port of New Orleans, except in certain particulars.

The Commission considers that the Railroad Commission of the State of Texas enforces its decree in such a way as to drive much cotton through the Port of Galveston, to the disadvantage of the port of New Orleans,

That certain other railroads make rates to Savannah that divert export cotton there, which would otherwise come here.

But both as to Galveston and Savannah this Commission can make no recommendations, except that the port of New Orleans must so use its natural advantages as to overcome such discrimination; the Legislature can enact no law to meet it.

There is one particular question germane to this subject which the Commission examined thoroughly.

It found that it was the custom of several railroads to demand of every shipper of export cotton through the port of New Orleans, originating along its lines, the payment of two cents per bale; and so far has this exaction been carried that no ship broker can do any business over one line, the foreign freight agent demanding the exclusive right to route all such cotton.

The Commission considers this regulation to be a violation of law,

The act of Congress requires every railroad to publish its tariff, and it is prohibited from receiving, directly or indirectly, any addition to that tariff, or to rebate any part of it.

The operation of this two cents per bale rule amounts to the collection of two dollars on every hundred bales of cotton in addition to its published tariff.

441*h* The United States Grand Jury has found indictments in this connection.

Steamship rates out of the port of New Orleans are not excessive but the Commission finds that the Leyland Line and the Harrison line have so manipulated rates out of New Orleans to Liverpool that, by a combination between themselves and the railroads, they have an absolute monopoly of that trade, no other line or no tramp ship ever assuming to enter into connection with them.

The Commission finds that the two lines render a splendid service, but the Commission believes that it has been injurious to the port to have tramp ships shut out.

Car Service Charges and Regulations.

The Commission finds that there is no material difference between New Orleans and other places so far as price and time are concerned; but that, whereas in other places concessions are made to shippers if they are unable to handle consignments due to strikes or other controlling causes, at New Orleans no such concessions are made, and the "Pound of flesh" is always exacted, no matter what happens.

Labor Charges and Regulations.

Since man has required of man his service for compensation, the irrepressible conflict has been going on, and he who adjusts it even for a short while may well congratulate himself upon the magnitude of his accomplishment.

The Commission has not found that labor has been or is overpaid in the city of New Orleans, nor has it found that it is any better or any worse than it is at other places.

The Commission did find, however, a very deplorable condition of affairs on the river front.

The great strike, or rock out, of last October brought this Commission into existence.

The Commission undertook the work of investigating that strike and its causes profoundly impressed with the seriousness of the task, fully convinced that should it emerge from the work with anything accomplished it could return to you and ask for judgment in its favor.

441*i* There was no hostility between employer and employed at Galveston none at Savannah; none at Pensacola, and none at Mobile.

At each port capital and labor were in accord, working for the up-building of the port and the common welfare of both.

When differences arose, master and man, employer and employé, got together and had a heart-to-heart talk threshed out the whole subject and settled it among themselves without stopping work or resorting to strikes or lockouts.

At New Orleans a condition of hostility, distrust and suspicion existed which created and maintained an open rupture. Each side demanded neither conceded; each accused and recriminated.

Conference upon any common ground seemed impossible. The ship-agent said he was entirely right and the laborer altogether wrong. The screwmen made his demand, and from it he would not recede.

The Commission sought in every way to reach the cause of this condition. It was not in the amount of compensation; the employer paid and the employed received it in entire satisfaction. It was not in the hours that made a day's work; both were satisfied. The steamship agent complained that he could not get despatch because the laborer would not stow enough cotton, but that lack of despatch was due to other causes quite as potent.

The laborer complained that the steamship agent exacted more onerous service of him, and that his condition was such that he had to work in season and out of season; that in spite of it all, the steamship agent gave him no consideration, and that, in order to protect himself he had made rules which he now confesses were unreasonable and in the enforcement of which the association gave him no latitude, punishing the slightest infraction with the severest fines.

And so they held on; the steamship agent insisting upon his rights unwilling to meet and confer with the laborer; and the Screwmen persisting in his position, never offering to make any concession.

The agent said he must have two hundred bales; the screwmen I will do one hundred and sixty bales.

Both sides unmindful of the fact that 350,000 people in the city were being ground between the upper and neither millstones 441j of their unreasonable position; that the farmer in the country was suffering for a market; that rival ports were getting the business and that trade was being diverted from this port which it would take years to get back.

The exposure of these conditions however, brought together the two elements and resulted in the submission of the whole matter to the Commission for arbitration.

It was claimed that much more than *than* 200 bales were being stowed by hand by a gang of five men each day at Galveston at a cost of \$31.00.

The screwmen in New Orleans, under the truce established last fall were stowing 180 bales, hand stowed cotton at a cost of \$26, plus the 'longshoreman's wage.

At Galveston there was being stowed about 87 bales of screwed cotton at a cost of 38 cents per bale.

At New Orleans there was being stowed 90 bales of screwed cotton at the cost of 34 cents per bale.

The Commission found that if 200 bales were being hand-stowed at Galveston per day at a cost of \$31.00, considering the fact of the

difference in her favor on screwed cotton, New Orleans would be about on a parity with Galveston with 187 bales of hand-stowed cotton at a cost of \$26.00, plus the longshoreman's wage.

It decided therefore, that the screwmen should stow 187 bales of hand-stowed cotton per day for \$26.00, and that a contract should be made between the parties to endure for five years from May 15, 1908.

The contract has been made to the satisfaction of all parties, and a copy is submitted with this report.

For that period peace is assured and the Commission indulges the hope that long before that time is out there will be such marked improvement in the relations between the parties that it can be confidently affirmed that peace is an assured fact for an indefinite period.

Peace is assured; the contract once made will be lived up to, for the testimony of all the agents was to the effect that the screwmen always keep their contracts.

441k

All Other Charges and Regulations.

The Commission was convinced that one of the prime causes militating against the port of New Orleans was what was known as the inspection system of the Maritime Branch of the New Orleans Board of Trade. For a long period the inspection of cotton was carried on by the Maritime Branch of the New Orleans Board of Trade, and such was its operation that shippers of cotton and the Cotton Exchange were in open warfare with the ship agents, the shippers of the cotton claiming that the inspection and discriminations were so great that thousands of bales of cotton were being diverted from the port of New Orleans.

The Commission found such to be the case, but with the exposure of the abuses the matter has resulted in an agreement between the Board of Trade and the Cotton Exchange whereby the inspection of cotton is placed under the control of the Cotton Exchange, and the whole matter is settled to the entire satisfaction of all concerned.

When it commenced its labors the Commission had no adequate idea of the magnitude of its task.

When it was well upon the way of its work, it did not dare hope that it could accomplish what has been brought about.

It felt that conditions were such that it would be justified in a serious criticism of both sides in the great strike last fall, but in the light of the settlement of the differences it can see no use for such criticism. Let the dead past bury its dead. Let all work shoulder to shoulder in the up-building of the finest port in the United States.

Galveston has no natural facilities that can be compared to New Orleans, Savannah is not to be mentioned in the same class; neither is Pensacola or Mobile equal to Galveston; and all combined, from that point of view, cannot hope to rival the Crescent City.

With the greatest river in the world, flowing through the greatest valley without limit to her water-front, where all of the navies of

the world can come and ride in safety, New Orleans has nothing to fear. If her people will keep alive to her possibilities, looking only to her advantages, using them as it was intended they should be used, will press steadily on to the fulfillment of her own great destiny as the metropolis of the Mississippi valley.

In this connection there is one thing paramount above all others with which this commission is impressed.

The Galveston water-front is a system of private terminals; so is that of Savannah, Pensacola and Mobile.

The shipping business of Galveston is simply a question of transferring freight from cars to ship. So it is in Savannah, Pensacola and Mobile.

Galveston's local trade is gone; so is that of Savannah.

Galveston is a completed city; so is Savannah.

These conditions show that the only way in which a city can derive the full advantage that belongs to it from its water-front is to operate it for itself by a system of public wharves.

It is as true as any fact can be, that the more public facilities that are given to corporations, the less will the city enjoy them.

Let us demonstrate our own situation by a concrete case.

A shipper from Chicago to any foreign port can consign his goods over Stuyvesant Docks without the least trouble, and of course a New Orleans shipper to the same port with an order originating in New Orleans can only send his goods over Stuyvesant Docks, if at all, by the gracious permission and favor of the foreign freight agent of the Illinois Central Railroad Company. Certainly not at all if the goods from Chicago and other places demand the room and facilities. The New Orleans people to whom the river front belongs are shut out to the advantage of the Chicago Shipper.

Following this condition to its logical conclusion and giving all the river front up to private terminals, the time would come when a New Orleans shipper could not ship through the port of New Orleans at all.

The river front is the greatest heritage which the people of New Orleans possess, and the policy of granting it to railroads is the most suicidal which can be pursued. Let her citizens look well to the preservation of this priceless privilege, for when once it is given away it can never be retaken.

The Belt Railroad.

The Commission finds that the Public Belt Railroad is nearly ready for operation, but that it, like the Board of Commissioners of the port of New Orleans, is restricted and limited by lack of means.

The Commission believes that through its instrumentality New Orleans will be relieved of many troubles that now beset her commerce, and that by means of the public belt railroad the cheap and easy handling and concentration of freight will be most surely accomplished.

The Commission recommends to the Legislature the passage of a law authorizing the issuance of bonds to facilitate the work, a copy of which is submitted herewith.

The Race Question.

One of the greatest draw-backs to New Orleans is the working of the white and negro races on terms of equality. It drags down the white man, it does not uplift the negro; and so we find white men working hopelessly for existence under these intolerable surroundings. These conditions do not exist in any other port. Elsewhere if the two races work in the same ship they load in different hatches. In New Orleans they work in the same hatch, abreast of each other, and often a negro foreman directs the white gangs.

The Commission believes that this has been the fruitful source of most of the trouble on the New Orleans levee.

United States Court Injunctions.

New Orleans has suffered her share of trouble from this source, common to all the country.

In one instance the Board of Commissioners of the port of New Orleans had purchased all of the material to widen the coffee sheds and wharves to a degree adequate for the trade.

The material was all on the ground when the Texas and Pacific Railway Company sued out an injunction, and for four years that injunction has stood; the Board has been powerless; the wharf has not been widened; the material is rusting away and the Board is out of its money without deriving and benefit from its expenditure.

441a

Uniform Bale.

The Commission found that Galveston enjoys one decided advantage in the handling of cotton in the fact that Texas produces a uniform bale of cotton; whereas there comes to the port of New Orleans all sorts and conditions of bales, varying in weight from 450 to 800 pounds which render the stowing of the cotton in a ship much more difficult and unsatisfactory.

The Commission recommends the adoption of a uniform box throughout the territory tributary to New Orleans. More bales can be handled and the space in the ship can be better used.

Green, the English historian, said that the day will come when the great country between the Rocky and Allegheny Mountains, teeming with millions of people, will dominate the world and that the channel of English thought, instead of running down the Thames and Mersey, will run down the Mississippi, and from thence would direct the commerce of the world.

How can it be otherwise: what must be the destiny of a city which holds the key to such a situation? Through her must be reached the heart of such a nation. Through her must pass this mighty influence.

Let no one paint a dark picture of New Orleans.

Her trade is steadily increasing; in some respects marvelously increasing. Should her natural advantages be used to the utmost of their possibilities, no one could place a limit to the greatness of the business of the port.

Let the knocker cease to knock! Let him throw away his hammer and unfurl the banner of good-will, industry and prosperity.

Cease croaking. Let the cry of the people of New Orleans be for New Orleans. Help "the butcher, the baker, the candlestick maker" at your door and each one of them will help you to place New Orleans in the foremost rank of the cities of the earth.

We have said that in some respects the trade of New Orleans is marvelously increasing. This is notably so of coffee and fruit, in both of which she has so far outstripped all rivals that there is no second.

But let us not lose sight of the fact that in lumber it has fallen far behind, to such an extent indeed that out of a thousand full cargoes exported last year from various ports, New Orleans only secured five, in spite of the fact that Louisiana is today the largest timber producing State, and in spite of the fact that railroad rates to New Orleans are less than to some of her competitors, and that the steamship rates are cheaper. The trouble is due to the fact that up to now New Orleans has had no facilities for handling the business but should they be enabled to get the funds, the Board of Port Commissioners intend to provide the necessary facilities at once.

The trouble is known and the remedy can be applied if the Legislature will put the Board in a way of getting the funds, as we have suggested.

The Commission believes that the showing of advantages and improvements has encouraged the people; and that the exposure of the abuses has so aroused them that they are all alive to the situation and intent upon helping along the good work.

The facilities for handling fruit are perfect and the best that can be conceived.

Look at the result.

New Orleans leads the world.

The facilities for handling timber are almost none at all.

Look at the result:

New Orleans lags last in the race.

So it is an easy conclusion to say:

That facilities added to natural advantages, will bring the trade. Natural advantages, unaided by facilities, will not keep the trade.

Facilities can only be had by the expenditure of money and the Board can only get it in the manner suggested.

There is yet one other bright side which we must not lose sight of in 1900 the coffee importations commenced to grow by leaps and bounds and from 314,555 bags in that year, it had reached 1,278,973 bags in 1904.

In 1904 the Dock Board prepared to increase the facilities for the handling of coffee, but was stopped by an injunction from the United States Court.

441p The increase from 1900 to 1904 was more than 400 per cent.

The increase from 1904 to 1907 was from 1,278,973 bags to 1,697,447 bags.

What would have been its growth if the facilities had been greater?

The Commission appreciates the fact that it is impossible to legislate effectively, if at all, upon many subjects which it has investigated and so refrains from much recommendation in that direction.

It believes that it has accomplished some of the most important things by exposing the abuses to which they have been subjected, and that the abuses of the few things, for which it asks legislative enactment, will be remedied by that means.

Work Accomplished.

Let us briefly summarize its work:

The labor question has been settled and peace is assured for five years at least.

The cotton inspection trouble has been arranged.

The railroad exaction has been submitted to the United States Grand Jury, and indictments have been returned.

Recommendations.

The Commission recommends:

A bill to submit a constitutional amendment providing for the issuance of bonds by the Board of Port Commissioners for the port of New Orleans.

A bill authorizing the Public Belt Railroad to issue bonds.

A bill regulating the whole subject matter of pilotage.

Its work is over; it submits to your will and pleasure.

The Commission recommends that 1,000 copies of this report be printed for distribution.

(Signed)

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C. C. CORDILL.

THOMAS C. BARRET.

S. R. LEE.

F. SALMEN.

GEO. H. TERRIBERRY.

[Endorsed:] "O 1." No. 79742. Div. C. Martin Behrman vs. La. Railway & N. Co. Offered by Plaintiff to be annexed to a Bill of Exceptions. Filed April 19th, 1909. (Signed) Joe Garidel, d'y c'lk.

442 EXHIBIT MARKED "O-2" (Report of E. L. Chappuis, Public Accountant).

Offered in Evidence by Counsel for Plaintiff.

Filed April 19, 1909.

MARCH 12TH 1908.

To the Honorable Chairman and Members, The Louisiana Port Investigation Commission, Progressive Union Building, City.

DEAR SIR: I have the Honor to return to you, under separate cover, the transcript, as made up by your official stenographer, Mr. Allen R. Beary, of your investigations at the Ports of Galveston, Savannah, Pensacola and Mobile covering 148-34-38 and 37 typewritten pages respectively and I have the honor to report that with the assistance of our Mr. Ellis I have made a careful analysis of the above mentioned data and herewith attached I beg to report my conclusions based upon the said testimony taken by your honorable Counsel, Mr. W. S. Parkerson and Mr. Samuel L. Gilmore and yourselves.

Respectfully submitted,

(Signed)

E. L. CHAPPUIS.

C. & D.

Copy.

443 *Concerning the Port of Galveston.*

Five Railroads enter Galveston, as follows:

Galveston, Harrisburg & San Antonio.

Gulf, Colorado & Santa Fe.

(These two are Southern Pacific Systems.)

Missouri, Kansas & Texas.

Galveston, Houston & Henderson.

International & Great Northern.

Trinity & Brazos Valley.

(Extracted from testimony pages 1 & 2.)

Railroads make the rate of 55¢ per 100 pounds, on cotton from all "Common point territory" to Galveston, which rate absorbs switching of \$1.25 per car paid to the Galveston Wharf Company, and 50¢ per car paid to the same Company for trackage and delivers the cotton unloaded on the dock, within reach of ship's tackle.

(Extracted from testimony pages 3-8-20-21 & 23.)

Railroads allow "free time" on cotton and cotton seed products and staves, of ten days when for export, but only 48 hours when for local delivery.

(Extracted from testimony pages 5 & 32.)

Railroads make good and damage, in their handling of cotton seed meal.

(Extracted from testimony page 64.)

The Galveston Wharf Company owns the entire wharfage (except what the Southern Pacific own) and they lease out to the Steamship Companies, wharf space at the rate of one thousand dollars per annum for a three hundred foot space, reserving the right to use said space whenever such steamship company is not using said space. (See continuation on next page.)

444 The Steamship Company charges to each ship using said space a minimum of \$100.00 each time for said three hundred foot space,—more space pro rata. In addition to the above, the Galveston Wharf Company makes "Tariff wharfage rates" both ways, as follows:

Cotton	1½¢ per 100 pounds.
Meal	1½¢ " " "
Almost everything else	1¢ to 1¼¢ " " "

(Extracted from testimony pages 18-68-69-89 & 90.)

The Port's "water-front" is about four miles.

The only exclusive right to use of pier, is that granted to Mr. E. H. Young, a cotton seed meal exporter, for whom the Southern Pacific Company built pier "C," at a cost of \$65,000.00, under a contract to the effect that the said Mr. Young should route all his freight over line of lines affiliated with said Company and his guarantee to handle so much freight (amount not mentioned)—for this Mr. Young pays \$15,000.00 annually.

(Extracted from testimony 16-17 & 23.)

The largest ship that enters this Port, is about 12000 tons, with maximum draft of about 30 ft.—the usual depth of water in harbor is from 25 to 27 ft.

(Extracted from testimony pages 14 & 39.)

The large majority of ships come to Port in ballast.

(Extracted from testimony page 15.)

As many as fifty ships have been berthed and loaded at one time.

(Extracted from testimony page 13.)

About 10% of Export cotton is flat (non-compressed).

(Extracted from testimony page 7.)

445 There is practically no lighterage done in the Port with the Exception of handling such machinery as may be too heavy to go over the wharf.

(Extracted from testimony page 38.)

Pilotage is at the rate of \$4.00 per foot of draft, each way, that is, in and out of harbor,—this charge is really compulsory on account of Insurance Company requirements.

(Extracted from testimony pages 39 & 69.)

Ships about the size of the Custodian (tonnage not indicated) can be loaded in about three or four days.

(Extracted from testimony page 65.)

A ship can take a full cargo at one pier, unless it goes to an elevator for grain.

(Extracted from testimony page 65.)

Moving a ship in the harbor, from one pier to another, costs \$35.00 for one tow boat or \$50.00 if two tow boats have to be used, besides \$10.00 for pilotage and \$4.00 for boatman.

(Extracted from testimony pages 66 & 70.)

There is no need of towage at Galveston, while at New Orleans it costs about \$250.00.

(Extracted from testimony page 109.)

When a ship buys coal at Galveston, it has to pay about double the price it would pay at New Orleans.

(Extracted from testimony page 109.)

As many "Tramps" come to Galveston as "Regulars" and the "Tramps" get equal dock facilities."

(Extracted from testimony page 16.)

446 The white screwmen's Association numbers about 500 men while the colored screwmen's Association numbers about 600 men.

(Extracted from testimony page 133.)

White cotton screwmen's work consists of nine hours with two recesses of 15 minutes each.

(Extracted from testimony page 26.)

Colored cotton screwmen work ten hours per day and they generally work for the Southern Pacific Company.

(Extracted from testimony page 26.)

Cotton Screwmen monopolize the handling of cotton, and they work for the stevedores in gangs of five, four men at \$6.00 and one foreman at \$7.00 per day respectively and a gang averages 210 bales of "hand-stowed" or 90 bales of "screwed" cotton,—therefore it costs the stevedores \$31.00 to "Hand-stow" 210 bales or \$31.00 to "screw" 90 bales.

Cotton season of 1906/1907 was more than three million bales of

which about one fourth was "screwed" and the balance was "hand-stowed."

The stevedore charges the steamship agent, about 40¢ per bale for "screwed" cotton and about 18¢ per bale for "hand-stowed" cotton, therefore the stevedore's profit on a "gang" for one day is about \$5.00 on "screwed" and about \$6.80 on "hand-stowed."

(Extracted from testimony pages 41 to 48-82-86-91-98-99-115-116-119-131-132 & 139.)

White cotton screwmen work at their trade about 140 days to the year, therefore earn an average of about \$800.00 annually and their living expenses are considered high in comparison to other cities, caused principally by the lack of truck gardens, etc. near Galveston.

(Extracted from testimony pages 45-63 & 99.)

447 Ocean rate on cotton from Galveston to Bremen, fluctuates around 35¢ per hundred pounds.

(Extracted from testimony page 73.)

Longshoremen are confined practically to the handling of cotton seed products, lumber, etc. and only participate in the handling of cotton when the screwmen need extra help.

Longshoremen work ten hours per day and are paid:

40¢	.....	per hour.	
60¢	.....	" "	Overtime.
80¢	.....	" "	Sundays.

and when longshoremen handle grain or cre-soted articles, they are paid,

50¢	.....	per hour.	
75¢	.....	" "	Overtime.
1.00	.....	" "	Sundays.

(Extracted from testimony pages 54-58-86-134-135-141 & 142.)

Stevedores charge the Steamship, as follows:

Cotton Seed Meal	.....	35¢ per ton.
Grain	.....	1.50 " thousand bushels.
Staves	.....	65¢ to 75¢ per ton.
Lumber	.....	65¢ " "

(Extracted from testimony pages 58 to 60.)

Stevedore in Galveston expresses the opinion that the New Orleans wharf facilities are at least equal to those in Galveston.

(Extracted from testimony page 61.)

448

Concerning the Port of Savannah.

The principal products exported from the port of Savannah, are as follows:

Cotton.

Cotton Seed Products.

Phosphate Rock.

Rosin & Turpentine.

(Extracted from testimony page 18.)

Free-time allowed by railroads is as follows:

On shipments for export	10 days.
“ “ “ local delivery	48 hours.

(Extracted from testimony page 15.)

The City wharfage is owned by Individuals and the Railroads, with the exception of one or two small wharfs, which are owned by the City. The Railroads practically control all the wharf space and wharfage is charged the railroad bringing in the freight and is of course absorbed in the rate. (No mention is made on any rates, either for freight or wharfage.)

(Extracts from testimony page 9 & 10.)

There are no “Liners” doing business with the port.

(Extracted from testimony page 2.)

A vessel carrying 18/20000 bales of cotton could be loaded in eight or ten days, by working between 450/500 men. The largest cargo ever loaded out of port was 24,700 tons.

(Extracted from testimony pages 22-23 & 29.)

Total cotton shipped to Savannah for season of 1906-1907 was 1,850,000 bales of which about 200,000 were compressed locally.

(Extracted from testimony pages 9-17-32.)

449 There is practically no drayage and all lighterage is done by the Savannah Litherage and Transfer Company and is paid for by the railroads, and this charge together with the unloading charges is absorbed in the freight rate.

(Extracted from testimony page 9.)

Pilotage is made compulsory by law. (Rate is not mentioned.)

(Extracted from testimony page 14.)

Unless a ship takes a full cargo of any one substance, she would have to be shifted from berth to berth, which would cost about \$35.00 per shift, (for tug).

(Extracted from testimony pages 24 & 25.)

Cotton is loaded by gangs consisting of five men (four men and one foreman) whose pay is \$1.55 per hour per gang, 30¢ per hour per man and 35¢ per hour for foreman. These laborers who work a day of ten hours are all colored. A gang will "screw" between 60 and 75 bales per day, and take the cotton from the "deckhands" who truck the cotton to them at the rate of 15¢ per hour. Practically 60% of all cotton handled is "screwed."

(Extracted from testimony pages 3-5-13-14-15 & 19.)

All other produce and merchandise is handled by the same men, in gangs, as with cotton, but their pay is different, as follows:

Cotton Seed Products	\$1.05 per hour per gang	
Naval Stores .....	.95 " " "	of four men.

(Extracted from testimony page 5.)

All stevedores are employed by Steamship Agents at an annual salary (approximate amount not mentioned).

(Extracted from testimony page 4.)

450 There is no discrimination between cotton consigned for export and cotton consigned for local delivery, by the railroads, but one of the advantages of consigning cotton through to the port of destination and getting a through Bill of Lading, is that this Bill of Lading is immediately negotiable at the point of issue whereas in the case of a local shipment, shipper would be compelled to await the arrival of the cotton at loading point, before obtaining a Port Bill of Lading.

(Extracted from testimony pages 6 & 11.)

Railroads deliver freight at ship-side.

(Extracted from testimony page 8.)

The Cotton handlers do not handle Phosphate Rock, of which considerable quantities go through the port. These handlers of Phosphate Rock are all colored men and they do not work in gangs, but have a foreman at each hatch, who works as many men as he needs, and they get paid at the rate of 15¢ per hour.

(Extracted from testimony page 19.)

On- million barrels of cotton seed oil are exported annually from the United States, of which 10% goes through the port of Savannah.

(Extracted from testimony page 32.)

Railroads have agreement- with each other to switch cars at the rate of \$3.20 per car regardless of distance.

(Extracted from testimony page 33.)

The Dock frontage extends for about three miles, but inclusive of the Slips, about eight miles.

(Extracted from testimony page 34.)

Concerning the Port of Pensacola.

Railroads allow "free time" of 48 hours on all cars for export, after which demurrage of \$1.00 per car per day is charged, but the railroad is very loose in its methods and this demurrage is not claimed unless a shortage of cars exists. "Free-time" allowed on cars for local delivery 24 hours.

(Extracted from testimony page 26.)

Majority of ships come to port in ballast.

(Extracted from testimony page 35.)

All piers and wharves are owned by private individuals, with the exception of one wharf which is owned by the City, but is leased to an individual.

(Extracted from testimony page 32.)

Tow boat charges are as follows:

"Free" Ship	25¢ per ton round towage.
"Consigned" Ship	15¢ " " " "

Additional Charges:

Loading Berth at Muscogee Commissory	} wharfs 1 3/10¢ per ton
" " " Torregano Street		} per day.
Shifting Ship	\$5.00
Taking in timber from water whilst alongside of wharf	5¢ per stick.
Privilege of having lighter hang on while at wharf	\$3.00
Wharfage at Perdido wharf	3¢ per ton.

(Extracted from testimony page 19.)

452 Cotton is handled by gangs, consisting of four men and one foreman, who get \$4.00 and \$5.00 (\$21.00 per day) respectively, for a day's work of nine hours, which gang will screw an average of 60/75 bales per day. These screwmen receive the cotton from the truckers who get \$1.75 per day. There is practically no hand-stowing done.

(Extracted from testimony pages 2-10-29 & 30.)

Cost of loading timber per day of eight hours by gang consisting of:

2 Swingers (a)	\$6.00 and 2 meals.....	\$12.00
1 Hooker (a)	\$5.00	5.00
4 Holders (a)	6.00 and 2 meals.....	24.00
10 wrenchers (a)	4.00	40.00
		<hr/> \$81.00

and this gang will load 100,000 feet and in addition to above there is a foreman over all the gangs (a) \$8.00 per day.

Overtime is as follows: \$1.00 per hour.

5 minutes work constituting an hour.

(Extracted from testimony pages 3-4 & 20.)

Stevedores charge for loading timber \$1.50 per M.

(Extracted from testimony page 20.)

Cost of handling lumber per day of nine hours, by gang consisting of 14 men with use of steam on winches 14 (a) \$4.00 \$56.00

Without

2 stowers	\$3.50	\$7.00	
6 followers	3.00	18.00	
6 men	2.50	15.00	
			\$40.00

(Extracted from testimony pages 11 & 23.)

453 All lumber is loaded from wharf and all timber is loaded from the water.

(Extracted from testimony page 21.)

Naval Stores are handled by gang consisting of

Foreman	\$5.00	per day.
Stowers	4.00	" "
Ordinary Laborers	2.00	" "

(No number of above is given.)

(Extracted from testimony page 4.)

White and colored laborers work together, in about equal numbers.

(Extracted from testimony page 4.)

Living in Pensacola is considered to be high in comparison with other towns.

(Extracted from testimony page 26.)

454

Concerning the Port of Mobile.

Cotton is shipped to Mobile on what is called "Shipside" Bills of Lading and is subjected to only 48 hours free time after notice of arrival to consignee, and lumber billed on local Bill of Lading, but marked for export, obtains 10 days free time.

Practically no lumber comes in on through Bill of Lading.

(Extracted from testimony page 25.)

Switching charges, to loading point, are \$2.00 per car, is absorbed in railroad rate.

(Extracted from testimony page 21.)

Wharfage charges as follows:

Cotton	4¢ per bale.
Lumber	20¢ per M.

(Extracted from testimony page 7.)

The dredged channel from the harbor to the sea is 26 miles in length and 100 feet in breadth and the help of tug is compulsory at a cost of 10¢ per ton, for a ship going out, but not when coming in light.

(Extracted from testimony page 11.)

The proportion of "Liners" to "Tramp" steamers is about 25% out of a total about 800 ships.

(Extracted from evidence pages 2-3.)

Pilotage is charged at the following rates, \$2.50 per foot of draft up to nine feet and up to \$6.00 per foot of draft up to twenty feet for which charges pilot brings vessel over the bar and up to the wharf, and when vessel is loaded there is an additional charge of 50¢ per foot of draft of 12 feet and over for "channel" pilotage maximum depth of water in harbor 20 to 22½ feet.

(Extracted from testimony page 5.)

455 A great deal of shifting is done, which costs according to the nature of the contract with the Towboat Association. The average shift costs from \$25.00 to \$30.00 regardless of number of tugs used and distance and in addition there is a harbor-master's fee of \$10.00 per shift and compulsory pilotage of \$10.00, making the cost altogether of one move about \$45.00 or \$50.00.

(Extracted from testimony page 10.)

Cotton handlers work in gangs of five consisting of four men and one foreman, who get \$5.00 and \$6.00 per day, of nine hours, respectively, and this gang will "screw" an average of 80 to 90 bales per day.

(Extracted from testimony pages 4-31 & 32.)

Total amount of cotton handled through port, during year, about 300,000 of which from 100,000 to 125,000 are compressed in Mobile.

(Extracted from testimony Pages 4 & 15.)

Cubic capacity of a bale of cotton in Galveston	26 feet.
" " " " " " " " New Orleans	27 feet.
" " " " " " " " Mobile	28 feet.

which partly accounts for the inability of Mobile screwmen to stow as many bales in a ship as at the other ports.

(Extracted from testimony page 18.)

It takes from fifteen to eighteen days to load out a vessel in Mobile.

(Extracted from Testimony pages 16 & 33.)

456 Lumber is handled exclusively by Negroes and the scale is 25¢ with an extra 5¢ for overtime.

Stevedores charge for Lumber is 75¢ to \$1.00 per M.

" " " timber " 75¢ to 90¢ per load of 50 cubic feet.

(Extracted from testimony pages 10-28 & 33.)

Timber is handled exclusively by white men who work in gangs of 15 men and their pay runs from the foreman (a) \$6.00 down to the tackles (a) \$4.00 per day and each gang makes about \$75.00 per day.

(Extracted from testimony pages 28 & 34.)

The Association of Screwmen, numbers about 500 members.

(Extracted from testimony page 29.)

(Here follows map, marked page 457.)

458 *Extract from Minutes of Board of Commissioners of the Port of New Orleans, April 9th, 1909.*

Offered in Evidence by Counsel for Plaintiff.

Filed April 19th, 1909.

New Orleans, April 8th, 1909.

Extract from Minutes.

Board of Commissioners of the Port of New Orleans.

Minute Book No. 4, Page 466.

MARCH 25TH, 1909.

The Board of Commissioners of the Port of New Orleans met this day at 2 o'clock P. M. in special Session.

Present: Commissioner McCloskey, President, in the Chair, and Commissioners Kernaghan, Byrnes, Dumser and Hardin.

The president stated the object of the meeting to be the consideration of the advisability of extending the wharves landings, sheds and other facilities to accommodate the growing commerce of the port.

* * * * *

The question of the advisability of extending the wharves, landings, sheds and other facilities to accommodate the growing commerce of the Port, for which the meeting was called, was then discussed; whereupon the following resolution was offered by Commissioner Dumser, and seconded by Commissioner Kernaghan:—

Whereas the necessity exists, in the judgment of the Board of Commissioners of the Port of New Orleans, for the extension of the wharves, landings, sheds and other facilities, owing to the growing commerce of this Port.

And whereas this Board should now exercise the right of extending said wharves, landings and shed system, delegated to it by the laws creating said Board:

Be it resolved that all that portion of the River front of the City of New Orleans, lying between Napoleon Avenue and the Upper Parish line of the Parish of Orleans, and all that portion of said river front of said City, lying between Clouet Street and the lower line of the Parish of Orleans, on the left bank
459 of the Mississippi River, be and the same is hereby appropriated for public wharves, landings and shed purposes where sheds may be necessary.

Be it further resolved that the Engineers of this Board prepare plans and specifications for the construction of such wharves, landings, sheds and other improvements as may be necessary to accommodate and facilitate the import and export business of the Port.

Be it further resolved that the plans and specifications to be furnished be of such character as will carry out the increased demands for additional wharves, etc., facilities.

Be it further resolved that a copy of this resolution be forwarded to the Board of Commissioners of the Orleans Levee District and that, after the properation of said plains, the proper request be made upon said Board of Levee Commissioners for its consent insofar as said consent may be necessary in the premises.

Upon call of roll, the following Commissioners voted in favor of the adoption of the resolution: Commissioners McCloskey, Kernaghan, Byrnes, Dumser and Hardin.

There being no votes to the contrary, the President announced the resolution as being unanimously adopted.

On motion of Commissioner Dumser the Attorney and Engineer of the Board were directed to confer with the object of carrying into effect these contemplated improvements at the earliest practical moment.

On motion of Commissioner Kernaghan, the meeting adjourned."

A true and correct copy.

[SEAL.]

(Signed)

TILEY S. MCCHESNEY,

Ass't Secretary and Treasurer.

460 *Official Proceedings Connected with the Passage of the New Orleans & San Francisco Railroad Company's Ordinance and the Louisiana Railroad & Navigation Company's Ordinance.*

Offered in Evidence by Counsel for Plaintiff.

Filed Nunc Pro Tunc as of Date of April 19th, 1909.

New Orleans November 15th, 1909.

460a *Official Proceedings of the City Council.*

Regular Session.

COUNCIL CHAMBER, CITY HALL,

NEW ORLEANS, July 28, 1903.

The Council met this day of 7:30 o'clock p. m. Hon. Wm. Mehle, President in the chair.

On calling the roll, the following members answered to their names: Briede, Dickson, Ewing, Frantz, Goebel, Lautenschlaeger, Mehle, Memory, Moss, O'Connor, Shields. Eleven members and a quorum present. All absentees entered, and were recorded as present, except Messrs. Carey, Cucullu, McRacken, Zacharie (absent with leave) and Mr. McMahon.

Ordinances on First Reading and Referred Under the Rules.

* * * * *

Cal. No. 2572. By Mr. MEMORY: An ordinance granting rights of way, etc, to the Louisiana Railway and Navigation Company, etc. Com. 6.

* * * * *

There being no further business, the Council adjourned to Tuesday, August 4, at 7:30 p. m.

T. W. CAMPBELL,
Clerk of Council.

460b

Official Proceedings of the City Council.

COUNCIL CHAMBER, CITY HALL,
NEW ORLEANS, LA., Sept. 1, 1903.

The Council met this day at 7:30 p. m. o'clock, Hon. William Mehle, president, in the chair.

On calling the roll, the following members answered to their names:

Present—Briede, Carey, Cucullu, Dickson, Ewing, Frantz, Gobel, Lautenschlaeger, McMahon, McRacken, Memory, Moss, Schabel, Shields, Zacharie—15.

Absent—Messrs. Mehle and O'Connor—2.

Fifteen members and a quorum present.

All absentees entered and were recorded as present, except Messrs. Mehle and O'Connor, absent on leave.

* * * * *

Reports of Committees.

* * * * *

Report of Committee No. 6.

Special Report of Committee on Streets and Landings on Cal. Ordinance No. 2572. By Mr. Memory—Granting Rights of Way to the Louisiana Railway and Navigation Company.

To the Hon. President and Members of the City Council.

GENTLEMEN: Your committee begs leave to report as follows:

The above ordinance was submitted to the Council on July 28th, 1903, read in full and referred to Committee No. 6. At the session of that committee on July 31, 1903, the ordinance was referred to the Committee of the Whole for inspection of line of proposed route in the rear of the city.

On Friday, Aug. 7th, 1903, the "Committee of the whole," with the exception of Mr. Moss, who was absent from the city, together with the representatives of the road, made the inspection, and at the first session of the committee, held Aug. 18, 1903, Mr. Dickson submitted a verbal report on the proposed route and conditions found.

The committee continued their sessions on Aug. 24th, 27th and 31st, during which all of the exchanges, through their representatives present, filed their endorsements, by resolutions, etc., in favor

of the grant; also property owners, the Shreveport Board of Trade, Natchitoches Progressive Union, South Land and Immigration Co. and other non-residents of the city filed their petitions, etc., in favor of the grant.

The property owners and all others interested, whether in favor of or against the grant, were heard at length. At the session of the committee, held Aug. 31st, Mr. Sol Wexler submitted an amendment making obligatory the payment of \$50,000 whether the belt was used or not by the Louisiana Railway and Navigation Co. This amendment was considered and rejected. Mr. Moss also submitted an amendment as follows:

In line 167 on page 9, strike out the word "joint." In lines 169 to 179, inclusive of both, on page 9, strike out the paragraph beginning with the words "and the Louisiana Railway and Navigation Company," and ending with the words "operated over said tracks."

This amendment was tabled.

Mr. E. H. Farrar, on behalf of the New Orleans and San Francisco road, protested against the adoption of the ordinance as amended.

After further discussion, the ordinance was reported favorably, with amendments, as requested by the exchanges and the Board of Control of the New Basir Canal, and the substitute of Mr. Cucullu to section 3, item (c), was adopted, in lieu of lines 40 to 58, both inclusive, on page 5 of the ordinance.

The amendment from the exchanges to section 3, the end of paragraph (k) to be added after line 234, was further amended by an agreement between the exchanges, the railroad officials and the committee, to strike out in lines 10, 11 and 14 the words and figures (\$25,000) twenty-five thousand dollars and insert, wherever they appear in lieu thereof, the words and figures (\$30,000) thirty thousand dollars.

460c The following sections of the original ordinance were adopted, without being amended:

Sections 1, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15.

The amendments to Sections 2, 3, 6, 7, are submitted herewith in proper order. On motion of Mr. Moss, the ordinance, as amended, was then reported favorably to the Council, and the Clerk was instructed to change the numbers of the lines to correspond numerically, made necessary by the adoption of the amendments.

Your committee begs to state that they gave to all interests a full and impartial hearing.

Respectfully submitted,

R. J. GOEBEL,

Chairman of Committee on Streets and Landings.

Received.

* * * * *

Unfinished Business.

Ordinances on Final Passage.

* * * * *

Cal. No. 2572. By Mr. MEMORY—Granting rights of way, etc., to the Louisiana Railway and Navigation Co., etc.

Mr. Dickson submitted a series of amendments (offered by the Exchanges and Board of Control of New Basin Canal, etc.), which were all adopted. Mr. Cucullu submitted a substitute amendment for paragraph C. of Section 3, which was adopted. (Note Special Report of Committee No. 6, this date, for details.)

Amend Section 2, paragraph 1, by adding at end of line 29, the following:

“Provided, that the right to cross the New Basin Canal with the draw bridge at grade, as above stated, is granted upon the condition that the said company place the pier of said draw bridge on the east side of the canal and as close to the bank of said canal as practicable. Plans for said crossing to be approved by the Board of Control of the New Basin Canal and Shell Road. The turning apparatus for said bridge to be operated by both hand and power devices, and said bridge to be always turned promptly on the usual notice being given by any water craft plying said canal.

“Provided, further, that where the tracks of said company cross the tracks of the Orleans and Jefferson Railroad and the Shell Road of the New Basin Canal, said company shall maintain and operate, at its expense, gates and signals.” Adopted.

Amend Section 2, paragraph 3, line 44, by adding the following at end of the line after the words “set out”:

“Provided said track shall be laid between Liberty street and Claiborne street immediately adjacent to the sidewalk or banquette line, starting at said banquette line and extending into the street for a distance of eight (8) feet from said banquette line. From Claiborne street to White street, said track to be laid on such portion of Julia street, or Florida landing, as may be designated and approved by the Board of Control of the New Basin Canal and Shell Road. Said track to be laid flush with the street and maintained between the rails and for two feet on each side thereof at the expense of said company. There shall be no parking of cars permitted upon the track provided for under this paragraph of this section under penalty of \$25 fine for each violation of this requirement, recoverable before any court of competent jurisdiction at the instance of the Board of Control of the New Basin Canal and Shell Road.” Adopted.

Amend Section 3, line 11, by adding the following at the end of the line, after the words, “Ordinance No. 1615, N. C. S.”:

“And with the limitations therein which recognize and preserve the present and future rights of the city of New Orleans over the projected Public Belt Railroad.” Adopted.

Amend Section 3 by striking out paragraph (a), being lines 18 to 30, both inclusive, and inserting in place thereof the following:

(a) That, when said Louisiana Railway and Navigation Company shall have operated its engines, trains and cars over said belt tracks, as provided in this ordinance, for a period of thirty days, the said company shall pay to the city of New Orleans the sum of Fifty Thousand Dollars (\$50,000), which sum is to be deposited with the fiscal agent of the city of New Orleans, to the credit of a special fund, and said fund shall not be used for any other purpose than the extension, equipment and operation of said Public Belt Line and the construction of said belt tracks, switches, side tracks, spurs and turn-outs, and the payment of the costs of right of way for such belt system; but no portion of this money shall be used for expenses of operation until the belt tracks are completed to Clouet street, and, when said company shall be ready to begin to operate

its engines, trains and cars as above provided, the said company shall deliver to the fiscal agent of the city of New Orleans, bonds or other securities, satisfactory to said fiscal agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company with the foregoing obligation, and to be returned to said company when said company shall have operated its engines, trains and cars over said belt tracks, as provided in this ordinance, for a period of thirty days, and shall have paid said sum of fifty thousand dollars to said fiscal agent. If, for any reason, said company shall not have or be accorded the right to operate its engines, trains and cars over said belt tracks, as provided in this ordinance, then such securities shall be returned to said company by said fiscal agent. Adopted.

Amend Section 3 by striking out paragraph (c) being lines 40 to 58, both inclusive, and by inserting in place thereof the following:

(c) That in the event of the New Orleans and San Francisco Railroad Company, its successors or assigns, failing, without legal excuse, to build said belt tracks from the upper side of Audubon Park to Henderson street, on or before July 1st, 1904, the Louisiana Railway and Navigation Company shall build the same from the upper side of Audubon Park to Henderson street, under the terms and conditions of paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.; and, in case said Louisiana Railway and Navigation Company shall build said tracks, it is hereby granted the right and privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of said paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., said Louisiana Railway and Navigation Company assuming the obligation of the New Orleans and San Francisco Railroad Company under said paragraph of said ordinance, and being hereby granted all the rights and privileges of said New Orleans and San Francisco Railroad Company, its successors or assigns, under said paragraph 10 of Section 2 of said ordinance, except as hereinafter provided, such construction of said tracks from the upper side of Audubon Park to Henderson street to be in lieu of the payment of \$50,000, referred to in paragraph (a) of this section; provided, that said Louisiana Railway and Navigation Company shall complete the said tracks to Henderson

street within one year from the time the city shall furnish the clear and undisputed right of way, it being always understood that said Louisiana Railway and Navigation Company assumes all the obligations of the New Orleans and San Francisco Railroad Company under paragraph 10 of Section 2 of said Ordinance No. 1615, N. C. S.; and provided that as soon as said belt tracks shall be completed to Henderson street, the same shall be turned over to the immediate ownership of the city of New Orleans and to be under the control and management of the public belt authority; and provided, further, that said Louisiana Railway and Navigation Company shall on July 1st, 1904, deposit with the fiscal agent of the city of New Orleans bonds or other securities, satisfactory to said fiscal agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company with the foregoing obligation and to be returned to said company when said company shall have built and completed said belt tracks from the upper side of Audubon Park to Henderson street; and, provided, further, that in case said company shall be prevented from building said belt tracks, or any portion of the same, on account of the city not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said fiscal agent.

Provided, further, that nothing in this ordinance or in this section or clause shall be construed as a waiver or abandonment of the rights that the city of New Orleans now has or may hereafter have under and by virtue of the provisions of Ordinance No. 1615, N. C. S., and provided, further, that nothing in this ordinance, section or clause shall be construed to relieve the New Orleans and San Francisco Railroad Company, its successors or assigns, from any of its obligations to the city of New Orleans arising under the provisions of Ordinance No. 1615, N. C. S.; and especially under paragraph 10 of Section 2 of said ordinance, it being distinctly understood and declared that the city shall be entitled to enforce all its rights under said Ordinance No. 1615, N. C. S., precisely as if this present ordinance had not been passed at all. Adopted.

Amend Section 3, by striking out paragraph (e), being lines 75 to 98, both inclusive, and inserting in place thereof the following:

(e) Unless otherwise ordered by the "Public Belt Authority," or until said "Public Belt Authority" is operating its own equipment over said system, completed to Clouet street, the Louisiana Railway and Navigation Company agrees to belt cars belonging to connecting railroads or to individuals, firms or corporations, over the belt line, and over all switches, spurs and sidings connected therewith and forming part thereof, without discrimination, treating and handling such belted cars as justly and as equitably as if they were its own cars coming off its own lines, charging for 460e such service, not exceeding \$2.00 per car, for placing a car and returning same empty, or vice versa; provided, however, that a similar obligation shall be hereafter placed on every contribut-

ing railroad hereafter admitted to the use of said belt tracks, and provided, further, that said Louisiana Railway and Navigation Company shall not, under this clause, or under any other clause of this ordinance be obligated to belt cars for any railroad company not now operating a line in the city of New Orleans, unless such other railroad shall become a contributor as herein provided to the belt road construction fund. Adopted.

Amend Section 3, paragraph (f), as follows:

In line 101, strike out the words, "city or her." Adopted.

In line 112, strike out the words, "city or her." Adopted.

In line 112, strike out the word "officials," and substitute in place thereof the word "Authority." Adopted.

Amend Section 3, paragraph (i), as follows:

In line 131, after the words, "City Limits," add the words, "and all switches connected therewith." Adopted.

In line 139, after the words, "its own cars," add a comma and the words, "the cars originating on the Public Belt." Adopted.

In line 144, strike out the word "unjust." Adopted.

Amend Section 3, paragraph (j), as follows:

In line 181, strike out the word "completed." Adopted.

In line 190, strike out the word "completed," and insert the word "whole," between the words "the" and "cost." Adopted.

In line 205, after the figures "1907," add the words, "and the tracks to Henderson street, or any part thereof, are constructed by the New Orleans and San Francisco Railroad Company." Adopted.

Amend Section 3, at the end of paragraph (k), line 234, after the letters "N. C. S.," by adding the following:

Provided that, in the event the belt shall be extended to Clouet street, and that the Louisiana Railway and Navigation Company shall not avail itself of the right to pay the additional sum as above provided and use the belt to Clouet street within a period of five years from the time said belt is completed to Clouet street, then and in that event, the said Louisiana Railway and Navigation Company shall pay to the Public Belt Authority of the city of New Orleans the sum of Twenty-five Thousand Dollars (\$25,000), the use and destination of said sum to be the same as provided for in the payment of the Fifty Thousand Dollars (\$50,000) as above provided for. Said additional payment of Twenty-five Thousand Dollars shall in no wise, however, authorize the using of the belt below Henderson street by the said Louisiana Railway and Navigation Company.

Provided, further, that any use by the Louisiana Railway and Navigation Company of the belt track from Henderson street to Clouet street, after the same shall have been completed, shall be deemed conclusive evidence of its agreement to accept the use of said entire belt, but shall not bind the said Louisiana Railway and Navigation Company as admitting the cost of the construction from the upper limits of Audubon Park to Henderson street, to be amount stated, by the New Orleans and San Francisco Railroad Company, its successors and assigns. It being understood that this right is

granted under the limitations of Ordinance No. 1615, N. C. S., which recognize and preserve all the present and future rights of the city of New Orleans over the projected Belt Railroad from the upper limits of the city to Clouet street. Adopted.

Amend Section 6, line 3, by inserting after the word "road," the words, "previously obtained." Adopted.

Amend Section 6, line 7, by adding the following after the word "Company."

"Provided that in no event shall any track or switches be laid as above provided, beyond the property line on the 'wood-side' of South Liberty street. Adopted.

Amend Section 7, line 4, by inserting after the word "granted," the words:

"Except on Julia street or Florida Landing." Adopted.

The roll was called on Calendar Ordinance No. 2572, as amended, and resulted as follows:

Yeas—Briede, Carey, Cucullu, Dickson, Ewing, Frantz, Goebel, Lautenschlaeger, McMahon, McRacken, Memory, Schabel, Shields, Zacharie—14.

Nays—0.

Absent—Mehle, Moss, O'Connor—3.

And the ordinance, as amended, finally passed.

NOTE.—Mr. Moss was absent from the council chamber on the adoption of the ordinance. On his return he desired to be recorded as voting for the ordinance. The chair called attention to the rules of the council, which prohibited him from voting under the circumstances existing. Mr. Moss then stated that had he been present he would have voted for the ordinance and the clerk was instructed to so record.

* * * * *

460f There being no further business, on motion, the Council adjourned to Tuesday next, September 8th, 1903, at 7:30 o'clock p. m.

E. T. MANNING,
Assistant Clerk of Council.

[Endorsed:] No. 79743. Civil District Court, Div. C. Martin Behrman, Mayor, vs. La. Railway & Navigation Co. Filed nunc-pro-tunc as of date of April 19th, 1909. New Orleans November 15th, 1909. (Signed) Joe. Garidel, D'y Cl'k.

461 EXHIBIT MARKED "D-1" (APPLICATION & BRIEF OF FOSTER,
MILLING, GODCHAUX & SANDERS.)

Offered in Evidence by Counsel for Defendant.

Filed April 19th, 1909.

461a D-1.

Supreme Court of Louisiana.

No. 14818.

PAUL CAPDEVIELLE, MAYOR OF THE CITY OF NEW ORLEANS,
versus
NEW ORLEANS & SAN FRANCISCO RAILROAD COMPANY et als.

Brief and Application to Reform Judgment.

FOSTER MILLING, GODCHAUX &
SANDERS, Attorneys.

"D-1."

461b Supreme Court of Louisiana.

No. 14818.

PAUL CAPDEVIELLE, MAYOR OF THE CITY OF NEW ORLEANS,
versus
NEW ORLEANS & SAN FRANCISCO RAILROAD COMPANY et als.

Brief and Application to Reform Judgment.

May it Please the Court:

An application for a rehearing in this case having been filed on behalf of the Mayor of the City of New Orleans, and being now pending before this Honorable Court, and the undersigned counsel having been consulted by the Shreveport & Red River Valley Railway Company as to its rights under the decision rendered herein, we beg leave to submit that upon examining the judgment of this Honorable Court, in connection with the admissions of counsel for defendant in their supplemental brief and in oral argument, it can be safely stated that said decision is clear and susceptible of but one interpretation. Yet, considering the opinion separate and apart from the admissions of counsel, which are not of record or embodied in the opinion, it may hereafter be contended by other parties that said decision is susceptible of a different construction from that which we believe is intended by the Court; and considering the vital in-

terest to this and other roads which may hereafter seek an entrance to this city, and to the city itself, involved in this decision, and for the purpose of leaving no doubt as to the judicial interpretation placed upon the ordinance, we respectfully submit that the following questions should be answered specifically by said decision, viz:

1. Has the Council of the City of New Orleans the same right and power to grant by ordinance to other roads than the New Orleans and San Francisco Railroad Company the use of the belt, when completed to Henderson street, as it had prior to the adoption of Ordinance No. 1615 N. C. S., known as the "Frisco Ordinance?" If not, in what respect or particulars is the authority of the Council limited or abridged by said ordinance?

2. Will any railroad other than the defendant, be required to pay for the use of the belt tracks down to Henderson street, and no further, the cost of construction of the $5\frac{1}{2}$ miles, say \$330,000? Or will it be permitted to use said belt down to said street upon such terms, conditions and requirements as the Council may ordain?

3. If this Honorable Court holds that any road now in the city, or which may hereafter come into the city, is entitled to the use of said belt tracks down to Henderson street, under such rules, regulations and requirements as the Council may adopt, without paying an amount of money equal to the cost of building the $5\frac{1}{2}$ miles paid by the Frisco Company, then can the Council grant such right at the present time, or is the exercise of that right suspended until the belt road passes into the possession of the city in 1907, or until the belt road is completed?

The interrogative propositions submitted in this connection are far-reaching and of the utmost importance, affecting the status, not only of the Shreveport and Red River Valley Railway Company, but of all other roads that may seek an entrance into New Orleans. If it is the intention and purpose of this Honorable Court to interpret the ordinance to mean what the admissions of the defendant's counsel seem to express, then we respectfully submit that a desired certainly requires that these admissions should be literally or substantially written in the opinion of the Court, and the interpretation of the ordinance which they lead to should be embodied in the Court's decree; for otherwise, in a litigation of the same question between other parties and in another jurisdiction, the interpretation and construction given by this decision may be contested or denied, especially since the admissions made in argument, written and real, form no part of the original record, and do not appear, save by reference, in the opinion of the Court heretofore rendered, and hence may not be apparent to the Court trying the issue anew. Upon a further consideration, it is believed that the Court will realize that the admissions themselves require interpretation and it is their interpretation by the Court itself which alone can free these points from difficulty and future trouble.

The admission of defendant's counsel in the supplemental brief is as follows:

"Having repudiated in our original brief and in oral argument the contention of the City Attorney, that the provisions of paragraph

10 of Section Two of Ordinance No. 1615 N. C. S., prohibit the City from granting a right of way over part of the belt tracks for such sum as the Council may fix, we desire again in the most formal way to reiterate the defendant's rejection of such interpretation.

"The ordinance, as the defendant interprets it, was intended to cover only a right of way over the whole belt, present and future, for which right it was to pay the cost of building $5\frac{1}{2}$ miles of double track, and for which right every other railroad was to pay the same sum and to have identically the same privileges.

"If the defendant, who is the only party in interest, formally and judicially rejects and repudiates the contention of the Mayor as to how this ordinance shall be interpreted making a grant to it, how can there any longer be any controversy about it?

"It never intended by any clause of the ordinance, to weaken, impair or contract away the police power of the City, and this intention is conclusively shown by Section 15 thereof, which declares:

"SEC. 15. Be it further ordained, etc., That nothing in this ordinance shall be construed as a restriction upon the lawful and reasonable exercise of the Police Power of the City of New Orleans over the said Company and its operations within the limits of the City of New Orleans."

"The Mayor and the City Attorney, in order to carry out their design of destroying the defendant's ordinance, will not be permitted to cram down the defendant's throat an interpretation of the defendant's rights which the defendant judicially repudiates."

The opinion of the Court in discussing this admission is as follows:

"Returning for a moment to consider specially the objection of plaintiff, urged on the ground that under the ordinance all railroads, even the railroad by which the two and a half miles of public tracks was built (and which now belongs to the city as part of the 461d belt system), are to be debarred from using any point of the tracks from the upper Parish line to Henderson street, unless they can pay about \$330,000 for the privileges.

"Defendant's counsel takes issue with plaintiff on this point, and says that the intention was not restricted, as plaintiff contends.

"We accept defendant's interpretation as entirely correct. There must be no dead stop in the interest of any one. The belt is open to all from the upper parish line to Henderson street, on the terms, which the city, alone, has the authority to determine and regulate. From that point of view, plaintiff's objection must fall."

An analytical reading of this decision, especially when taken in connection with the admissions and declarations of the defendant company, leads to the conclusion that these questions have been settled by the Court in its judgment; yet we respectfully submit that this construction of the ordinance, based largely upon the admissions of counsel for defendant, should be so well safe-guarded that no uncertainty or misapprehension can arise upon this important subject. It seems to us that the above excerpt, taken from this decision, unequivocally declares that all roads seeking to use the belt have the right to do so from the upper parish line to Henderson street, upon

such terms and conditions as the Council may require, disregarding the arbitrary sum fixed in the ordinance in question; yet this interpretation or construction is given to the ordinance mainly through the admissions of the defendant in argument or brief, and we suggest that it may be possible and highly probable that the present franchises may be transferred to a foreign corporation, and another Court and another jurisdiction be invoked by other counsel for a different construction of this ordinance; and unless the judgment of this Court practically writes into its decree the admissions of counsel and the construction given by the Court of those admissions, the ordinance now in controversy may be fruitful of further litigation.

It is not our purpose or intention to discuss the ordinance or the meaning or effect of said ordinance, but simply to ask the Court, in the interest of the parties we represent, and of the public generally, for an elucidation of the propositions we have submitted, as they are of the utmost importance, not only to the parties we represent, but to the entire railroad interests of the City of New Orleans.

The Shreveport & Red River Valley Ry. Co. has now before the Council of the City of New Orleans, an ordinance upon this subject matter, and the company wishes to pursue whatever rights it may have in the premises in strict accordance with a judicial determination of this controversy; and an opinion of this Honorable Court, susceptible of but one construction, passing upon the propositions we have submitted, seems to us all-important in order to properly guide it and the City Council in their future action.

This road has about three or four hundred miles of trackage, all of it within the limits of the State of Louisiana; and it expects to reach the City within a few months, establishing its terminal facilities here if it is possible to secure the use of the belt tracks upon terms not prohibitory. So this Honorable Court will see at once the bearing of the propositions hereinabove submitted, upon the rights and conduct of said road.

The road-bed of this company being entirely within the State of Louisiana, if it is required to pay the sum of \$330,000, or the cost necessarily expended in the construction of the belt track 461e down to Henderson street, it would be practically denied the benefits of this belt system, and an entrance into the City of New Orleans. So, likewise, would every other road, chartered by and built within the State, be practically prohibited from using this belt road, unless it is connected with some the vast systems of railway of this country.

With great respect, we submit these propositions to the Court and upon consideration of same, we respectfully pray your Honorable tribunal to reform the judgment and decree herein, so as to pass specially on the questions herein suggested.

Respectfully submitted,

FOSTER, MILLING, GODCHAUX &
SANDERS, Attorneys.

[Endorsed:] No. 79,743. Civ. Dist. Court. Behrman, Mayor, v. La. Ry. & Nav. Co. Offer of Def't. "B-1." Filed April 9th, 1909. (Sg., Joe. Garidel, D'y Cl'k.

462 EXHIBIT MARKED "B-2" (Resolution Extending Time to Complete the Belt Railroad).

Offered in Evidence by Counsel for Defendant.

Filed April 19th, 1909.

B 2.

77.

New Business.

Under this heading the Mayor's message was taken up and the following motion by Mr. Cucullu was adopted:

By Mr. CUCULLU:

Whereas, the Hon. Paul Capdevielle, Mayor of this city, has filed a suit in his official capacity to annul Ordinance No. 1615, N. C. S., granting rights of way, etc., to the New Orleans and San Francisco Railroad Company; and

Whereas, said ordinance provides that said company shall do certain acts within certain periods after the acceptance thereof, and Whereas, said Company has given this council notice that it accepted said ordinance on the 16th day of February, 1903;

Be it moved by the council that all the delays provided in said ordinance shall not begin to run until the suit afore said is finally decided.

Adopted.

CLERK'S OFFICE, CITY HALL,
NEW ORLEANS, August 26th, 1903.

I hereby certify the above to be a true and correct copy of the extract of the Minutes of the City Council of date March 3rd, 1903.

(Signed)

E. T. MANNING,
Ass't Clerk of Council.

[Endorsed:] B 2. No. 79743. Div. C. Behrman vs. La. R. & N. Co. Offered by the Def't. Filed April 19th, 1909. (Signed) Joe Garidel, d'y cl'k.

463 EXHIBIT MARKED "B-3" (Act Accepting Ordinance 1997.)

Offered in Evidence by Counsel for Defendant.

Filed April 19th, 1909.

463a

D-3. B-3.

STATE OF LOUISIANA,

Parish of Orleans, City of New Orleans:

Act No. 601.

*Acceptance of Ordinance by The Louisiana Railway & Nav. Co.,
Sept. 17th, A. D. 1903.*

Be it known, That on this seventeenth day of the month of September in the year nineteen hundred and three, before me, Frederick Zengel, a Notary Public, duly commissioned and qualified, in and for the City of New Orleans, in the Parish of Orleans, and State of Louisiana, and official notary of the City of New Orleans, domiciliated in the said city and parish, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared The Louisiana Railway and Navigation Company, a corporation organized under the laws of the State of Louisiana, and domiciled in the City of Shreveport, in said State, by Peter Melvried, its Vice-President and General Manager, herein appearing for and in behalf of said Company, under and by virtue of a resolution of the Directory of said Company, adopted on the 10th day of September 1903, a certified copy of which is hereto annexed and made part hereof:—

Who declared unto me, notary, that the Louisiana Railway and Navigation Company hereby accepts in all its terms and conditions Ordinance No. 1997, New Council Series, adopted by the Council of the City of New Orleans on the 1st day of September 1903, and approved on the 4th day of September 1903, and promulgated in the New Orleans Item the official journal of the City of New Orleans, on September 3th, 1903, the said ordinance (a copy of which is hereunto annexed for reference and made part hereof) being entitled "An Ordinance Granting Rights of Way and Depot and Other Rights and Privileges to the Louisiana Railway and Navigation Company."

That this formal declaration is made before me, City Notary, aforesaid, in accordance with Section Fifteen of said ordinance, which requires that said ordinance shall be accepted within sixty days from the date of its promulgation by resolution of the Board of Directors of said Company, and by an act before the City Notary, and when so accepted shall be a contract between the City of New Orleans and said Company, its successors and assigns.

4636

MAYORALTY OF NEW ORLEANS,
CITY HALL, Sept. 4, 1903.

Calendar No. 2572.

No. 1997, New Council Series.

An Ordinance Granting Rights of Way, and Depot and Other Rights and Privileges to the Louisiana Railway and Navigation Company.

SECTION 1. Be it ordained by the Council of the City of New Orleans, That the Louisiana Railway and Navigation Company, a corporation organized under the laws of the State of Louisiana, and domiciled in the City of Shreveport, its successors and assigns, is hereby granted the right to enter the City of New Orleans, and to construct, maintain and operate with steam, electric or other power, its line of railway tracks along, across and over the streets, highways and public places hereinafter mentioned, and to acquire for railway purposes by expropriation or otherwise, all property in the City of New Orleans needed for railway purposes, such as tracks, spurs, side-tracks, yards, water or oil tanks, shops, platforms, sheds, warehouses, roundhouses, coal chutes, loading bins, wharves, elevators, depots and other appropriate purposes, and particularly the property hereinafter designated.

SEC. 2. Be it further ordained, etc., That said company, its successors and assigns, is hereby granted the following rights of way in and through the City of New Orleans, to-wit:

(1.) Commencing at a convenient point in the west line of the Parish of Orleans, Louisiana, near the intersection of Protection and Oleander streets, said company shall have the right to construct, equip and maintain, two standard gauge tracks, with such turn-outs, cross-overs and switches as may be necessary, along, across and upon the following named streets, viz: Protection, Oleander, Livingston, Forshey, Live Oak, Olive, Cherry, Edinburg, Laurel Grove, Hamilton, Palm, Holly Grove, Stroelitz, General Ogden, Palmetto, Eagle, Dixon, Monroe, Leonidas, Joliet, Peach, Cambronne, Dante and the Shell Road, all of said streets being located in the Seventh Municipal District, to the New Basin Canal, thence across the New Basin Canal with a drawbridge at grade with the shell road, and across Florida landing to and into square of ground designated by the municipal number 776, located in the First Municipal District; thence through said square to South Carrollton avenue and across South Carrollton avenue to Poydras Canal or City Ditch; thence with as many tracks as it may choose to lay, along and upon said Poydras Canal or City Ditch in a southeasterly direction to Poydras street at its junction with White street, after filling said City Ditch as hereinafter provided:

"Provided that the right to cross the New Basin Canal with the drawbridge at grade, as above stated, is granted upon the condition that the said company place the pier of said drawbridge on the east

side of the canal and as close to the bank of said canal as practicable. Plans for said crossing to be approved by the Board of Control of the New Basin Canal and Shell Road. The turning apparatus for said bridge to be operated by both hand and power devices, and said bridge to be always turned promptly on the usual notice being given by any water craft plying said canal.

"Provided, further, that where the tracks of said company cross the tracks of the Orleans & Jefferson Railroad and the Shell Road of the New Basin Canal, said company shall maintain and operate, at its expense, gates and signals."

(2.) Commencing at said junction of White and Poydras streets, said company shall have the right to construct, equip and maintain one standard gauge track along and upon Poydras street to Lafayette street, thence along and upon Lafayette street to South Claiborne street.

(3.) Said company shall have the right to construct, equip and maintain, one standard gauge track, from a point in the main line, at or near the junction of Poydras and South White street, thence along and upon the north bank of the New Basin Canal, also known as Julia street, or Florida Landing, to Liberty street, with the right to make switches and curves from said track into its property, acquired and to be acquired, as hereinafter set out.

"Provided that said track shall be laid between Liberty street and Claiborne street immediately adjacent to the sidewalk or banquette line, starting at said banquette line and extending into the street for a distance of eight (8) feet from said banquette line. From Claiborne street to White street, said track to be laid on such portion of Julia street, or Florida Landing, as may be designated and approved by the Board of Control of the New Basin Canal and Shell Road. Said track to be laid flush with the street and maintained between the rails and for two feet on each side thereof at the expense of said company. There shall be no parking of cars permitted upon the track provided for under this paragraph of this section, under penalty of \$25.00 fine for each violation of this requirement, recoverable before any court of competent jurisdiction at the instance of the Board of Control of the New Basin Canal and Shell Road.

(4.) Said Company shall have the right to construct, equip and maintain, one standard gauge track, from the track provided for in the first paragraph of this section, leaving the same at the junction of Lafayette and Cypress streets along and upon Cypress street to Liberty street, with the right to construct turn-outs and switches from said track into its property, acquired or to be acquired, and to connect the track provided for in this paragraph, with the track hereinabove provided for on Julia street.

SEC. 3. Be it further ordained, etc., That whereas, under Ordinance No. 1615, N. C. S., the New Orleans & San Francisco Railroad Company, its successors or assigns have been granted the right to construct at their own cost and expense the double track Belt line over the Belt reservation on the river front, from the present end of the Public Belt on the upper side of Audubon Park to Henderson street, and under said ordinance — company dedicates said tracks to

perpetual public use, therefore under the Belt provisions of said Ordinance No. 1615, N. C. S., "and with the limitations therein which recognize and preserve the present and future rights of the City of New Orleans over the projected Public Belt Railroad," the Louisiana Railway and Navigation Company is hereby granted a right of way over the double track Belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson street, upon the following terms and conditions:

(a) That when said Louisiana Railway & Navigation Company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, the said company shall pay to the City of New Orleans the sum of fifty thousand dollars (\$50,000), which sum is to be deposited with the Fiscal Agent of the City of New Orleans, to the credit of a special fund, and said fund shall not be used for any other purpose than the extension, equipment and operation of said Public Belt Line and the construction of said Belt tracks, switches, side tracks, spurs and turn-outs, and the payment of the costs of right of way for such Belt system; but no portion of this money shall be used for expenses of operation until the Belt tracks are completed to Clouet street, and when said company shall be ready to begin to operate its engines, trains and cars as above provided, the said company shall deliver to the Fiscal Agent of the City of New Orleans bonds or other securities, satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company, with the foregoing obligation, and to be returned to said company when said company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, and shall have paid said sum of fifty thousand dollars to said Fiscal Agent. If, for any reason, said company shall not have or be accorded the right to operate its engines, trains and cars over said Belt tracks, as provided in this ordinance, then such securities shall be returned to said company by said Fiscal Agent.

(b) That in consideration of the payment of the above sum, the Louisiana Railway & Navigation Company shall have the right to operate its own locomotives, cars and equipment over the said Public Belt from the upper city limits to Henderson street, provided that said company and all railroads using said tracks shall belt all cars to and from their respective lines over all switches, spurs and sidings forming part of the Public Belt tracks, free of cost.

(c) That in the event of the New Orleans and San Francisco Railroad Company, its successors or assigns, failing, without legal excuse, to build said Belt tracks from the upper side of Audubon Park to Henderson street, on or before July 1st, 1904, the Louisiana Railway & Navigation Company shall build the same from the upper side of Audubon Park to Henderson street, under the terms and conditions of Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.; and, in case said Louisiana Railway & Navigation Company shall build said tracks, it is hereby granted the right and

privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of said Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., said Louisiana Railway & Navigation Company assuming the obligation of the New Orleans and San Francisco Railroad Company under said paragraph of said ordinance, and being hereby granted all the rights and privileges of said New Orleans and San Francisco Railroad Company, its successors or assigns, under said Paragraph 10 of Section 2 of said Ordinance, except as hereinafter provided, such construction of said tracks from the upper side of Audubon Park to Henderson street to be in lieu of the payment of \$50,000 referred to in Paragraph (a) of this section; provided, that said Louisiana Railway & Navigation Company shall complete the said tracks to Henderson street within one year from the time the City shall furnish the clear and undisputed right of way, it being always understood that said Louisiana Railway & Navigation Company assumes all the obligations of the New Orleans & San Francisco Railroad Company under Paragraph 10 of Section 2 of said Ordinance No. 1615, N. C. S.; and provided that, as soon as said Belt tracks shall be completed to Henderson street, the same shall be turned over to the immediate ownership of the City of New Orleans and to be under the control and management of the Public Belt authority; and provided, further, that said Louisiana Railway & Navigation Company shall on July 1st, 1904, deposit with the Fiscal Agent of the City of New Orleans, bonds or other securities satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company with the foregoing obligation and to be returned to said company when said company shall have built and completed said Belt tracks from the upper side of Audubon Park to Henderson street; and provided, further, that in case said company shall be prevented from building said Belt tracks or any portion of the same, on account of the City not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said Fiscal Agent.

Provided further, that nothing in this ordinance or in this section or clause shall be construed as a waiver or abandonment of the rights that the City of New Orleans now has or may hereafter have under and by virtue of the provisions of Ordinance No. 1615, N. C. S., and provided further, that nothing in this ordinance, section or clause shall be construed to relieve the New Orleans & San Francisco Railroad Company, its successors or assigns, from any of its obligations to the City of New Orleans arising under the provisions of Ordinance No. 1615, N. C. S.; and especially under Paragraph 10 of Section 2 of said ordinance, it being distinctly understood and declared that the City shall be entitled to enforce all its rights under said Ordinance No. 1615, N. C. S., precisely as if this present ordinance had not been passed at all.

(d) That in the event the New Orleans & San Francisco Railroad Company, its successors and assigns, shall from any cause complete only a portion of the tracks from the upper side of Audubon Park

to Henderson street, the Louisiana Railway & Navigation Company, its successors and assigns shall have the right to operate its own locomotives, cars and equipment over such portion of the tracks as is already built, and as may be built by the New Orleans & San Francisco Railroad Company, its successors and assigns, and for such privilege shall pay to the City of New Orleans such proportion of the sum provided in Clause (a) of this paragraph as the tracks so constructed and used by said Louisiana Railway & Navigation Company bear to the whole length of the tracks from upper city limits to Henderson street.

(c) Unless otherwise ordered by the "Public Belt Authority," or until said "Public Belt Authority" is operating its own equipment over said system, completed to Clouet street, the Louisiana Railway & Navigation Company agrees to belt cars belonging to connecting railroads or to individuals, firms or corporations, over the belt line, and over all switches, spurs and sidings connected therewith and forming part thereof, without discrimination, treating and handling such belted cars as justly and as equitably as if they were its own cars coming off its own lines, charging for such service, not exceeding \$2.00 per car, for placing a car and returning same empty, or vice versa; provided, however, that a similar obligation shall be hereafter placed on every contributing railroad hereafter admitted to the use of said belt tracks, and provided further, that said Louisiana Railway & Navigation Company shall not under this clause, or under any other clause of this ordinance, be obligated to belt cars for any railroad company not now operating a line in the City of New Orleans, unless such other railroad shall become a contributor as herein provided to the belt road construction fund.

(f) That all controversies between the Louisiana Railway & Navigation Company on the one side and the Public Belt Authority, or any other company or companies to which the City or her Public Belt Authority may grant the use of said tracks and appurtenances on the other side, relative to the use of side tracks and appurtenances or the cost of construction or maintenance thereof, or the rules and regulations relative to the movement and handling of cars, trains and traffic thereon and thereover shall be submitted to the arbitration of three disinterested persons; one to be selected by said Louisiana Railway & Navigation Company; the second by the Public Belt Authority, or such other company or companies, as the case may be; and the third by the two thus chosen; and the decision of this tribunal, or any two of them, shall have the effect of an amicable composition.

(g) That all damages to life and property caused by the fault or negligence of the officers or employes of any company, while operating over said Belt tracks, shall be borne exclusively by said company, and the City shall in no respect be responsible therefor.

(h) That the Louisiana Railway & Navigation Company, its lessees, successors, and assigns, shall not discriminate at any time, illegally or unjustly, against the City of New Orleans.

(i) That the said Louisiana Railway & Navigation Company, its lessees, successors and assigns, shall be bound to switch or belt,

without unreasonable delay over its main tracks within the limits of the City of New Orleans, and over all other tracks laid in the public streets or public places within said city limits, and all switches connected therewith, owned, controlled or leased by said railway company, its lessees, successors or assigns, except into the private property or terminals of said railway company, that is, depots, warehouses, elevators and other like terminals, owned or operated by the railway company, its lessees, successors and assigns, for a reasonable compensation, not to exceed the maximum charge of \$2.00 per car, its own cars, the cars originating on the Public Belt, and the cars of any other railroad company, now operating, or which may hereafter operate, a line of railroad within the City of New Orleans, also cars belonging to the individuals, firms or corporations, when such service shall be requested and no discrimination shall be made between different companies or individuals entitled to and requesting such service; provided, that said railway company, its lessees, successors and assigns, shall not be obliged to switch cars to or from the tracks of other railroad companies for a less sum than other railroad companies charge it for a similar service, until such time as other railroad companies operating in the City of New Orleans agree with the City of New Orleans upon a fixed switching or belting charge; nor shall it be obliged to perform such service on its main tracks for any railroad that refuses to perform the same service for it on its main tracks and for the same charges and under the same conditions. All cars coming to the City over the lines of the Louisiana Railway & Navigation Company shall be delivered to points on its tracks free of belting charges.

(j) That the movement of trains, cars, and traffic on and over said tracks from the upper limits of the City to Henderson street, until the City completes her Belt system to Clouet street, and begins to operate them as a part of said system, shall be under the joint direction, control and management of the New Orleans & San Francisco Railroad Company, its successors and assigns, and the Louisiana Railway & Navigation Company, its successors and assigns, unless during this period the Public Belt Authority shall grant other railroads a right of operation over said tracks similar to that herein granted to the Louisiana Railway & Navigation Company, in which event the control and management of movement of trains, cars, and traffic over said tracks, to Henderson street, shall be under the joint control of such companies as may be granted the same right of operation over said tracks, and when the City shall begin to operate said tracks as part of her Belt system, the movement of trains, cars, and traffic on and over said tracks shall be under the sole direction, control and management of the Public Belt Authority of the City of New Orleans, provided always that there shall be no discrimination against the trains, cars, and traffic of the Louisiana Railway & Navigation Company or any other company, granted the right to use said tracks. Until the City begins to operate said tracks as a part of her Belt system, the whole cost of maintenance, operation and management shall be borne jointly by the New Orleans & San Francisco Railroad Company, its successors and assigns, and the Louisiana

Railway & Navigation Company, its successors and assigns on a wheelage basis, unless during this period the Public Belt Authority shall grant to other railroads a right of operation over said tracks similar to that herein granted to said Louisiana Railway & Navigation Company, in which event the cost of maintenance and the usual and proper parts of the cost of operation and management shall be borne on a wheelage basis by all companies operating over said tracks. If, however, the Belt is not completed to Clouet street by July 1st, 1907, and the tracks to Henderson street, or any part thereof, are constructed by the New Orleans & San Francisco Railroad Company, the sole control and management of said Belt tracks shall revert to the Public Belt Authorities of the City of New Orleans; provided always, if for any reason the City of New Orleans or her Public Belt Authorities shall not assume control and management of said tracks on July 1st, 1907, the Louisiana Railway & Navigation Company shall have the same right of control and management of the movement of trains, cars, and traffic over said tracks as has — heretofore, or may be hereafter granted to any railroad company.

(k) That in the event said Belt tracks shall be completed to Clouet street, and said Louisiana Railway & Navigation Company shall desire to use that portion of the Belt which may be built from Henderson street to Clouet street, it shall have the right to operate its trains, cars, and traffic over the completed Belt, upon the payment to the Fiscal Agent of the City for the use and benefit of the Belt Fund, of a sum which, added to the sum to be paid under Clause (a), Section 3, of this ordinance, shall make the total sum paid by said Louisiana Railway & Navigation Company equal to the cost of the construction of the Belt tracks from the upper side of Audubon Park to Henderson street, expended by the New Orleans and San Francisco Railroad Company, its successors or assigns, in the construction of said tracks from the upper side of Audubon Park to Henderson street, as provided in Ordinance No. 1615, N. C. S.:

"Provided that, in the event the Belt shall be extended to Clouet street, and that the Louisiana Railway & Navigation Company shall not avail itself of the right to pay the additional sum as above provided and use the Belt to Clouet street within a period of five years from the time said belt is completed to Clouet street, then and in that event, the said Louisiana Railway & Navigation Company shall pay to the Public Belt Authority of the City of New Orleans the sum of thirty thousand dollars (\$30,000), the use and destination of said sum to be the same as provided for in the payment of the fifty thousand dollars (\$50,000) as above provided for. Said additional payment of thirty thousand dollars shall in no wise, however, authorize the using of the Belt below Henderson street by the said Louisiana Railway & Navigation Company.

"Provided further, That any use by the Louisiana Railway & Navigation Company of the Belt track from Henderson street to Clouet street, after the same shall have been completed, shall be deemed conclusive evidence of its agreement to accept the use of said entire Belt, but shall not bind the said Louisiana Railway & Navigation

Company as admitting the cost of the construction from the upper limits of Audubon Park to Henderson street, to be the amount stated by the New Orleans and San Francisco Railroad Company, its successors and assigns. It being understood that this right is granted under the limitations of Ordinance No. 1615, N. C. S., which recognize and preserve all the present and future rights of the City of New Orleans over the projected Belt Railroad from the upper limits of the City to Clouet street.

SEC. 4. Be it further ordained, etc., That the said company shall have the right to acquire, by expropriation or purchase, the eighteen squares of ground designated by the Municipal numbers five hundred and ninety-nine (599), five hundred and eighty-eight (588), five hundred and seventy-three (573), five hundred and sixty-one (561), five hundred and forty-four (544), five hundred and thirty-one (531), five hundred and fifteen (515), five hundred and two (502), four hundred and ninety-two (492), four hundred and seventy-nine (479), four hundred and fifty-nine (459), four hundred and Forty-five (445), Four Hundred and Twenty-six (426), Four Hundred and Eleven (411), Three Hundred and Ninety-five (395), Three Hundred and Seventy-eight (378), Three Hundred and Sixty-one (361), and Three Hundred and Forty-six (346), all being situated in the First Municipal District of the City of New Orleans and lying between Julia, Liberty, Cypress and Poydras streets, and the intersection of Poydras and Julia streets at White street; also all of those fractional blocks, or squares of ground lying between Lafayette and Cypress streets, from South Galvez to South Claiborne street, viz: Numbers Five Hundred and Fifteen and one-half (515½), Five Hundred and One (501), Four Hundred and Ninety-three (493), Four Hundred and Seventy-eight (478), and Four Hundred and Sixty (460), and the fractional blocks or squares of ground lying between Poydras and Lafayette streets, from Rocheblave to Galvez street, viz: Five Hundred and Sixty (560), Five Hundred Forty-five (545), and Five Hundred and Thirty (530), and upon the property so acquired, to construct, establish and maintain all facilities of every kind and nature necessary, appropriate and convenient for its railway purposes, such as car-yards, car-sheds, shops, round-houses, coal yards, bins and chutes, freight sheds and warehouses, elevators, loading and unloading platforms, car, freight and passenger depots and their appurtenances; and to this end, for these purposes, to lay tracks across the following streets between Cypress street and Julia street, or Florida Landing, viz: Tonti, Miro, Galvez, South Johnson, South Prieur, South Roman, South Derbigny, South Claiborne, Willow, Clara, Magnolia, South Robertson, Freret and Howard streets, and also across the following streets between Lafayette and Cypress streets, viz: South Johnson, South Prieur, South Roman, South Derbigny, and South Claiborne streets; and also across Miro and Tonti streets between Lafayette and Poydras streets, and also across the following streets between Poydras and Julia streets, viz: South Rocheblave, South Dorgenois and South Broad streets.

SEC. 5. Be it Further Ordained, etc., That nothing herein contained shall be construed as restricting the said company to the prop-

erty herein mentioned for railroad and terminal purposes, but it shall have the right, from time to time, to extend its terminal area, and to acquire as many squares of ground adjacent to the squares and routes herein specified as its business may require, and to connect said property by tracks and switches to the routes and property herein set forth, and for that purpose to extend its switches and tracks along and across intervening streets to reach all such additional property acquired for terminal purposes. It shall further have the right to construct switches and side-tracks into industries that may be, from time to time, established adjacent to its routes, and terminal properties, and to cross and use the intervening streets for such tracks. The words "adjacent squares" or "adjacent property" in this section shall be construed to mean only such squares or property as are separated from the property or routes of said company by the width of a single intervening street. The said company shall also have the right to connect, by all necessary and convenient switches and turnouts, its property and terminals on the Mississippi river, now acquired or hereafter to be acquired, with the double track belt line and reservation on the river front of the city.

SEC. 6. Be it Further Ordained, etc., That, with the permission of the Board of Control of the New Basin Canal and Shell Road, previously obtained, said company shall have the right to lay switches and side-tracks along the banks of the New Basin Canal for the purpose of the interchange of traffic between the same and the road of said company. Provided, That in no event shall any track, or switches be laid as above provided beyond the property line on the "woodside" of South Liberty street.

SEC. 7. Be it Further Ordained, etc., That said company shall have the right and privilege to set up telegraph and telephone poles along the rights of way and tracks herein granted, except on Julia street or Florida Landing and to string wires over, across and along the public highways aforesaid, such poles and wires, however, not to impede or obstruct unnecessarily the use of such public highways.

SEC. 8. Be it Further Ordained, etc., That all of the above tracks laid along and across the public highways shall be laid on lines and grades to be approved by the City Engineer, and shall be so laid and maintained as not to interfere with or obstruct the drainage of the city, or the reasonable use of the said streets. Cars shall not be parked on tracks constructed along the highways aforesaid, nor shall they stand or be parked so as to obstruct any cross street. No structure shall be built by said company conflicting in any way with the present or proposed system of Sewerage, Drainage, or Water Works, until a plan of the same has been approved by the Drainage Commission or Sewerage and Water Board, or their successors, through the properly authorized officer of such Board or Boards. Such approval of plans, however, shall not operate in any way to relieve the said Louisiana Railway & Navigation Company from responsibility for any damage which may be caused to the works of the said boards by the construction or operation of its system.

SEC. 9. Be it Further Ordained, etc., That all streets through and

across which the tracks of said company are laid shall be kept in good order and condition between the rails and two feet on each side thereof. All pavements taken up in the laying of such tracks shall be relaid at the company's cost to the satisfaction of the City Engineer and the Commissioner of Public Works, and shall be thereafter maintained between tracks and for two feet on each side thereof. On all streets not now paved, which may hereafter be paved by the city, the said company shall pay the cost of paving between the rails and two feet on each side thereof, and the same rule shall apply to the renewal of pavements on streets now paved.

SEC. 10. Be it Further Ordained, etc., That between White street and Liberty street, the speed of the trains of said company shall not exceed ten miles per hour; and between White street and the city limits, it shall not exceed twenty miles per hour.

SEC. 11. Be it Further Ordained, etc., That said company shall begin construction work within the City of New Orleans within six months from its acceptance of this ordinance.

SEC. 12. Be it Further Ordained, etc., That said company shall, at its own expense, fill, with suitable material, the old Poydras Drainage Canal, or City Ditch, from Rocheblave street to Carrollton avenue.

SEC. 13. Be it Further Ordained, etc., That all grants and privileges herein given are made for the period of the charter of said company, its successors and assigns.

SEC. 14. Be it Further Ordained, etc., That nothing in this ordinance shall be construed as a restriction upon the lawful and reasonable exercise of the police power of the City of New Orleans over said company and its operations within the limits of the City of New Orleans.

SEC. 15. Be it Further Ordained, etc., That this ordinance shall be accepted within sixty days from the date of its promulgation by a resolution of the Board of Directors of said company, and by an act before the City Notary, and when so accepted shall be a contract between the City of New Orleans and said company, its successors and assigns.

Adopted by the Council of the City of New Orleans, Sept. 1st, 1903.

E. T. MANNING,
Assistant Clerk of Council.

Approved Sept. 4, 1903.
A true copy:

PAUL CAPDEVIELLE, *Mayor.*
JOS. T. BUDDECKE,
Acting Secretary to the Mayor.

463c Office of the Louisiana Railway and Navigation
Company.

SHREVEPORT, LA., September 10th, 1903.

At a meeting of the Board of Directors of the above Company, held at Shreveport, Louisiana, the place of its domicile, on the 10th day of September, 1903, at which a quorum of said Board was present, the following resolutions were unanimously adopted:

"Resolved, That this Company does hereby accept ordinance No. 1997, New Council Series, adopted by the Council of the City of New Orleans, September 1st, 1903, approved September 4th, 1903, and promulgated in the New Orleans Item, the official journal of the said City of New Orleans, on September 8th, 1903, said ordinance being entitled "An ordinance granting rights of way and depot and other rights and privileges to the Louisiana Railway and Navigation Company."

"Resolved, further, that Peter McIlvried, Vice President and General Manager of this Company, be and he is hereby authorized and directed to appear before the City Notary of the City of New Orleans and accept said ordinance by notarial act."

I, Clarence Ellerbe, Secretary, do hereby certify that the foregoing is a true and correct copy of the resolutions adopted by the Board of Directors of the Louisiana Railway & Navigation Company at a meeting held in the city of Shreveport, Louisiana, on the 10th day of September, 1903.

In testimony whereof, I have hereunto set my official signature, this 10th day of September, A. D. 1903.

(Signed)

CLARENCE ELLERBE,
Secretary, Louisiana Railway and Navigation Co.

Sworn to and subscribed to before me, the undersigned, a Notary Public, duly commissioner and qualified, in and for the Parish of Caddo, in the State of Louisiana, as witness my official signature and seal, at my office, in the City of Shreveport, parish and State aforesaid, on this, the 10th day of September, A. D. 1903.

(Signed)

ALLEN RENDALL,
Notary Public, Caddo Parish, Louisiana.

463d Thus done and passed, in my office at New Orleans, aforesaid, in the presence of John R. Loomis and John F. A. Hebel, witnesses, both of lawful age, and domiciliated in this city, who sign these presents together with the parties and me, Notary, the day and date first aforesaid.

(Original Signed)

PETER MCILVRIED,
Vice Prest. & Genl. Mgr.
JOHN R. LOOMIS.
JOHN F. A. HEBEL.
FRED. ZENGEL, *Not. Pub.*

[SEAL.]

A true copy:

New Orleans, November 25th, 1903.

(Signed)

FRED. ZÈNGEL,
Not. Pub.

[Endorsed:] B-3. New Orleans, Sept. 17th, 1903. Copy. Act of Acceptance of Ordinance by the Louisiana Railway and Navigation Company. Frederick Zengel, City Notary.

463e [Endorsed:] B-3. No. 79743. Behrman vs. L. R. & N. Co. Offered by Def't. Civil District Court. Paid Apr. 16, 1909. Thomas Connell, Clerk. Filed April 19th, 1909. (Signed) Joe. Garidel, D'y Cl'k.

464 EXHIBIT MARKED "B-4" (Copy of Letter Dated N. O. May 15th, 1906).

Offered in Evidence by Counsel for Defendant.

Filed April 19, 1909.

NEW ORLEANS, LA., May 15th, 1906.

To the Honorable the Mayor and Members of the City Council of the City of New Orleans, City Hall, City.

GENTLEMEN: We beg respectfully to notify you that we intend, to-morrow, Wednesday, May 16th, at about 9 o'clock A. M., inaugurating the actual work of building the belt tracks from the upper side of Audubon Park to Henderson Street, over the belt reservation on the river front, by virtue and in accordance with the terms of Ordinance No. 1997 N. C. S., adopted by the City Council of New Orleans on the first day of September, 1903, and approved by the Mayor September 4th, 1903, entitled An Ordinance Granting Rights of Way and Depot and other rights and Privileges to the Louisiana Railway & Navigation Company.

This notification is given in conformity with our promise to His Honor the Mayor, to the effect that we would advise him when active work would be commenced.

Construction work will be started at the end of the present belt tracks at or near the upper side of Audubon Park, at the time above stated.

We were in conference for some time with the body known as the Public Belt Railroad commission for the City of New Orleans, with the view of Attempting to adjust the difference- which appear to exist between that body and ourselves, with reference to our rights on the public belt reservation; but since April 12th, 1906, negotiations seem to have been summarily broken off by the Belt Commission, since a proposition submitted by us on that date has not as yet received consideration, nor have we been honored with an acknowledgment of the receipt thereof.

465 The near approach of the time granted us by the aforesaid ordinance within which to complete the belt to Henderson Street renders it absolutely necessary that we delay active work no further.

Yours respectfully,

LOUISIANA RAILWAY & NAVIGATION
COMPANY,

(Signed) By WM. EDENBORN, *President*.

EXHIBIT MARKED "B-5" (Copy of Letter Dated N. O., May 15th, 1906).

Offered in Evidence by Counsel for Defendant.

Filed April 19, 1909.

NEW ORLEANS, LA., *May 15th, 1906.*

Honorable Martin Behrman, President of the Public Belt Railroad Commission for the City of New Orleans, City Hall, City.

DEAR SIR: We beg respectfully to notify you as President of the Public Belt Railroad Commission for the City of New Orleans, that we intend, to-morrow, Wednesday, May 16th, at about 9 o'clock a. m., inaugurating the actual work of building the belt tracks from the upper side of Audubon Park to Henderson Street, over the Belt reservation on the river front by virtue and in accordance with the terms of Ordinance No. 1997 N. C. S., adopted by the City Council of New Orleans on the first day of September, 1903, and approved by the Mayor September 4th, 1903, entitled an Ordinance Granting Rights of Way and Depot and Other Rights and Privileges to the Louisiana Railway and Navigation Company.

This notification is given in conformity with our promise to His Honor, the Mayor, to the effect that we would advise him when active work would be commenced.

466 Construction work will be started at the end of the present belt tracks at or near the upper side of Audubon Park, at the time above stated.

We were in conference with your Honorable Body, with the view of attempting to adjust the difference- which appear to exist between your body and ourselves, with reference to our rights on the public belt reservation; but since April 12th, 1906, negotiations seem to have been summarily broken off by the Belt Commission, since a proposition submitted by us on that date has not as yet received consideration-, nor have we been honored with an acknowledgment of the receipt thereof.

The near approach of the time granted us by the aforesaid ordinance within which to complete the belt to Henderson Street renders it absolutely necessary that we delay active work no further.

Yours respectfully,

LOUISIANA RAILWAY & NAVIGATION
COMPANY,

(Signed) WM. EDENBORN, *President*.

(Del'v'd by Mr. E. in person.)

EXHIBIT MARKED "B-6" (Copy of Receipt Dated N. O., Nov. 10, 1905).

Offered in Evidence by Counsel for Defendant.

Filed April 19, 1909.

Copy.

NEW ORLEANS, LA., Nov. 10, 1905.

Received this day from the Whitney-Central National Bank, for account of the Louisiana Railway & Navigation Company, fifty (50) 4% bonds of the State of Louisiana, numbered as follows:

Nos. 4571, 4572, 4485, 4486, 4487, 4488, 414, 333, 464, 466, 465, 608, 1122, 1291, 1292, 1293, 1294, 1568, 1569, 1681, 1928, 2929, 2941, 2942, 3154, 3700, 3701, 3702, 3868, 4226, 4240, 4248, 4489, 4543, 4544, 4545, 4546, 4547, 4593, 4769, 7305, 6159, 7745, 8305, 8306, 7311, 8307, 1285, 1953, 4186.

467 Satisfactory to the undersigned Fiscal Agent, of the value exceeding fifty thousand (\$50,000) dollars, the same being deposited and held in escrow subject to the terms and conditions of Paragraph C of section 3 of Ordinance 1997, N. C. S., approved by the Mayor Sept. 4, 1903.

(Signed)

INTERSTATE TRUST & BANKING
COMPANY,
Fiscal Agent of the City of New Orleans,
HENRY H. YOUNG, *Trust Officer.*

I hereby certify that the above and foregoing is a true copy of receipt delivered Whitney-Central National Bank, November 10, 1905.

(Signed)

INTERSTATE TRUST AND
BANKING CO.,
By HENRY M. YOUNG,
Trust Officer.

EXHIBIT MARKED "B-7" (Document Dated Pittsburg, Pa., Aug. 4, 1902).

Offered in Evidence by Counsel for Defendant.

Filed April 19, 1909.

225 4TH AVENUE,
PITTSBURG, PA., Aug. 4, 1902.

J. H. Price, Esq., Tradesman's Building, Pittsburg, Pa.

DEAR SIR: The Pittsburg & Southern Coal Company, by their Committee; S. S. Crump, W. B. Rodgers and S. L. Wood,—offer you

their property at New Orleans, La., known as "Willow Grove Coal Landing and the Stock of the Pittsburg & Southern Coal Company for the sum of One hundred Seventy-Two Thousand dollars. (\$172,000).

468 Terms.—Five Thousand Dollars (\$5,000) down on the acceptance of this offer; Forty-Five Thousand Dollars (\$45,000) upon examination of title not later than October 1st, 1902, and balance when the bonds have been paid and mortgage satisfied; and the stock surrendered.

All outstanding Bonds of the Pittsburg & Southern Coal Company, dated August 1st, 1890, amounting to Thirty-Four Thousand, Five Hundred Dollars (\$34,500) and accrued interest to be paid and cancelled and mortgage satisfied out of the second payment.

Title to the above property to be satisfactory to your Louisiana attorney.

Yours truly,

(Signed)

"

"

S. S. CRUMP,
W. B. RODGERS,
SAMUEL L. WOOD,
Committee.

Accepted this 4th day of August, 1902.

(Signed) J. H. PRICE.

Witness.

(Signed) C. A. DICKSON.

EXHIBIT MARKED "B-8" (Receipt Dated Pittsburg, Pa., August 4, 1902).

Offered in Evidence by Counsel for Defendant.

Filed April 19, 1909.

225 4TH AVENUE,
PITTSBURG, PA., August 4, 1902.

Received of J. H. Price on account of property sold to him this day, subject to examination of title, the sum of Five Thousand Dollars (\$5,000).

(Signed)

"

"

S. S. CRUMP,
W. B. RODGERS,
SAMUEL L. WOOD,
Committee of Pittsburg & Southern Coal Company.

- 469 EXHIBIT MARKED "B-9" (Agreement of Sale and Receipts for First and Second Payments August & October, 1902).

Offered in Evidence by Counsel for Defendant.

Filed April 19th, 1909.

PITTSBURG, *October 4th*, 1902.

We hereby acknowledge receipt of the sum of Forty-Five Thousand (\$45,000.00) Dollars, being the second payment on contract of August 4th, 1902 between the Pittsburg & Southern Coal Company and J. H. Price, for the property known as the "Willow Grove Coal Landing" at New Orleans, La., and the capital stock of this Company.

In accepting this money we hereby agree to pay forthwith all outstanding bonds of this Company and to cancel the Mortgage securing same. We also agree to pay any and all other claims of every nature and to hold the capital stock and the property of this Company free of every indebtedness, ready for the final payment in accordance with the terms of the said contract.

(Signed)

"
"

S. S. CRUMP,
WM. B. RODGERS,
SAMUEL L. WOOD,
Committee.

- 470 EXHIBIT MARKED "B-10" (Document Dated New York, May 20th, 1905).

Offered in Evidence by Counsel for Defendant.

Filed April 19, 1909.

Passenger and Freight Line of Steamers, New Orleans to Europe.

ST. GEORGE HOTEL,
BROOKLYN, N. Y., *May 20*, 1905.

Wm. Edenborn, Esq., 71 Broadway, N. Y.

DEAR SIR: I propose as follows as to the above:

1st. To form in Great Britain a Company with sufficient capital to build, maintain, and operate a line of first class ocean going steamers to run in connection with your Louisiana Railway and Navigation Company from its terminus near New Orleans, to British, Belgian, French and Mediterranean ports, according to the season, and as freight offers.

2nd. The fleet shall comprise at least twenty steamers of at least 10,000 tons net register each, of suitable draft of water for the New Orleans and above European ports trade. Speed twelve to fourteen

miles an hour at sea, each steamer fitted with ample cold storage rooms and accommodations for a first class passengers and 1,000 emigrants.

3rd. The steamers to be ready to begin the service when your railway and wharves are completed to and at New Orleans. If not then quite ready, the Steamer Company to charter suitable steamers to perform the service, till its own steamers are ready for it.

4th. Your Louisiana Railway and Navigation Company for ten years from the commencement of the steamer service to interchange with our steamer company, all freight and passengers from and to points on your railway for and from Europe. The Steamer

471 Company to charge and receive the "going" freight and passage money from time to time current from New Orleans to the various European ports. Passage tickets and bills of lading to be based on such current rates.

The various depot agents and ticket officers of your Railway and the Steamer Company to act as agents for securing passengers and freight for each undertaking, to the best of their ability and without charge for such agency services.

5th. Your Railway Company to make no charge to the Steamer Company for wharfage or storage of traffic interchanged between your Railway and the Steamers, for the use of your wharves and stores, nor for cargo or passengers transferred from alongside the steamers to or from other craft in the Mississippi.

6th. Should there be authorized by general law and levied on cargo and passengers landed or embarked by our steamers from your wharves, any State or Municipal tax for such landing or embarking, your Railway to pay half thereof and our Steamer Company to pay the other half thereof.

7th. Freight and passengers for interchange between your Railway and our Steamers, at all times to have the preference over and prompt despatch before any other traffic.

8th. The Steamer Company will require lands suitable to sell to the emigrants, and I will feel obliged if you will include in the arrangement (or as a separate contract if you prefer) the sale of a large block or blocks of suitable lands, preferably along the line of your railroad.

Yours truly

(Signed)

GEORGE WILSON.

472 EXHIBIT MARKED "B-11" (Copy of Charter of Louisiana Railway and Navigation Co.).

Offered in Evidence by Counsel for Defendant.

Filed April 19th, 1909.

STATE OF LOUISIANA,
Parish of Caddo:

Be it known that on this the 9th day of May A. D. One thousand, Nine hundred and three (1903) before me Allen Randell, a Notary

Public in and for the Parish of Caddo and State of Louisiana, duly commissioned and qualified, in the presence of the witnesses hereinafter named and undersigned, came and appeared the several persons whose names are hereunto subscribed who declared that availing themselves of the provisions of the laws of this State relative to the organization of corporation- for works of public improvement and utility, and relative to the organization of corporations generally, they have covenanted and agreed, and by these presents do covenant and agree and bind and obligate themselves, as well as such other persons as may hereinafter become associated with them to form and constitute a corporation and body politic in law for the objects and purposes and under the agreements and stipulations following viz:

Article I.

The objects and purposes for which this corporation is organized and the nature of the business to be carried on by it, are declared to be.

First. The construction, ownership, operation and maintainance of a railway from a point to be selected by its Directors on the Gulf of Mexico, in Louisiana, to and into the City of New Orleans, Louisiana, thence traversing the State of Louisiana in a northerly or northwesterly direction to and into the City of Shreveport, Louisiana; thence in a northerly or Northwesterly direction to a point to be selected by its Directors on the Northern or Western
473 boundary of the State of Louisiana, for the transportation of freight and passengers, and to that end to buy, lease and construct a railroad, or railroads, and branches and extensions with all the appurtenances, subsidies, property, rights, franchise privileges and exemptions thereto belonging.

Second. To own and operate steamships, steamboats, barges and other vessels either in domestic, inter-state, or foreign trade and either in connection with its railway and other business, or independently thereof.

Third. The construction, acquisition by purchase or otherwise maintenance and operation of electric or magnetic lines of telegraph, telephone or other means of communication, for the transmission of messages either in connection with its operation of its railway and steamboat and steamship lines in the transportation of freight and passengers, or independently thereof.

Fourth. To construct, establish or lease, purchase and to own, lease maintain and use, docks, warehouses and elevators in connection with its business of operating its railway, steamship or steamboat lines, or independently thereof.

To make rates and interchangeable traffic rates for the transmission of messages and for the transportation of persons and property over its line of railway, telegraph, telephone, steamship, steamboats and other vessels, and to receive for such messages, communications and transportation such tolls and charges as may be established by the authorized officers; to fix such charges for the use and operation of its docks, warehouse, elevators as its authorized officers

may determine, and generally to have and exercise for all purposes connected with or identical to its business and purposes above defined, all powers conferred upon corporations by the laws of the State of Louisiana.

474 Fifth. To obtain, accept and receive from any State, Parish, District, City, Town, Village, or person, or persons, any rights, privileges, franchises, or exemptions, which the same may offer for the construction, maintenance, management and use of its railway lines or other business, which the same may choose to grant, confer or give.

Article II.

The name, title, and style of this corporation shall be "Louisiana Railway & Navigation Company," and under its corporate name it shall have power and authority to have and enjoy life and succession for the full term of Ninety-nine (99) years from and after the date hereof; to exercise all the powers already enumerated in Article I, hereof, and to contract, sue, and be sued, to make and use a corporate seal, same to break or alter at pleasure; to hold, receive, lease, purchase and convey, as well as mortgage and hypothecate under its corporate name, property both real and personal for its various business, as set forth in Article I of this Charter.

It shall have power to borrow money and as evidence of its indebtedness to issue its corporate bonds or promissory notes bearing interest and made payable either in United States Currency or Gold Coin, payable at such time and place as may be deemed advantageous by the directors of this Company and for securing the payment of said bonds or notes to mortgage and pledge its railway lines, steamships, or other vessels, its warehouse, docks, telegraph and telephone lines, franchises, earnings, its terminal properties, its real or personal property, either as a whole or any portion thereof.

It shall have power to name and appoint such managers, directors officers and agents as the interest and convenience of said corporation may require; to make and establish such by-laws, rules and regulations for the operation and proper management of its affairs

475 as may be necessary or proper, the same to change at pleasure, and to general- possess all the powers heretofore enumerated and that now are or may be hereafter conferred by law necessary to promote its various objects and purposes.

Article III.

The domicile of the said corporation shall be in the City of Shreveport, Parish of Caddo, State of Louisiana, and all citation and other legal process shall be served on the president of the said Corporation, or in the case of his absence upon the Vice-President, or in the absence of said officers, upon the Secretary of said Company.

Article IV.

The corporate powers of this corporation shall be vested in and be exercised by a Board of Directors composed of Seven stockholders.

Said Directors shall be elected annually on the First Tuesday after the First Monday in January of each year, and all such election- shall be by ballot, and be conducted at the Office of the said corporation under the superintendence of three commissioners to be appointed by the Board of Directors of which election thirty (30) days' prior notice shall be given in a news paper published in the City of Shreveport; and the Directors thus elected shall serve until their successors shall have been elected. A majority of the votes cast shall elect, and each share of stock shall be entitled to one vote, either in person or by proxy. A failure to elect Directors on the day required, shall not dissolve the corporation, but the then Board of Directors shall continue to hold office and another election shall be held within thirty days thereafter, or as soon as practicable, and ten days' prior notice thereof shall be given in a news paper published in the City of Shreveport. Any vacancy accruing in the said Board, from any cause whatever, shall be filled by election by the remaining directors. Four Directors shall constitute a quorum for the transaction of business.

476 Said Board of Directors at their First meeting in each year shall elect one of their number a President, a Vice-President, a Second Vice-President, a Treasurer and a Secretary who may also be Treasurer, and shall appoint from time to time such officers, clerks and agents (and confer power to appoint and dismiss same or any proper officer) and other employes as may be deemed necessary for the business and purpose of the said corporation, and dismiss the same at pleasure, and shall have full power to make and establish as well as change or amend and alter conformably to this act of incorporation, all by-laws, rules and regulations requisite for the support and management of the affairs and business of the said corporation, and shall have full power to borrow money, execute mortgages, issue bonds, make contracts, make rules for the declaration of dividends, and generally to do all the things and acts in all matters pertinent to the objects and purposes of this corporation which are or may be permitted by the laws applicable to corporations; also to issue and deliver full paid shares of stock on the bonds or obligations of this corporation, in payment for labor done, or money or right in property actually received.

But, any by-law or rule is subject to repeal or modification or change by the holders of a majority of the stock at any meeting of the Company. At all meetings of the Directors the Director or Directors not present in the City of Shreveport may give their proxy to a Director present, such proxy may be general to cast the vote of the absent Director on all the matters that may come before the Board as the Director holding the proxy may think proper, or the proxy may specifically direct how and in what sense the vote of the absent Director shall be cast.

477

Article V.

The Capital stock of this corporation is hereby fixed at Twelve Million Dollars (\$12,000,000) divided into or represented by One

Hundred and Twenty Thousand (120,000) shares of One Hundred Dollars, and which stock shall be paid as follows: In cash, or its equivalent in property, in the installments as called for by the Board of Directors. The Corporation may commence business when Six Thousand (6000) shares of stock are subscribed for and paid up and no certificate of stock shall be issued until fully paid up. In case of the failure of any subscriber to pay the installment demanded on his stock as required, the Board of Directors shall have the option, after thirty (30) days' written notice to the delinquent, of forfeiting his stock with all its amounts previously paid thereon, and no stockholder shall have the right to vote while in default for unpaid installments on his stock. No stockholder shall be liable or responsible for the contracts or faults of the said corporation, in any further sum than the unpaid balance due on the shares of stock owned by him; nor shall any mere informality in organization have the effect of rendering this Charter null, or of exposing a stockholder to any liability beyond the amount of his stock. The subscription and stock books shall be kept at the domicile and in the office of the Company, where certificates of stock shall be issued to the subscriber, and no transfer of stock shall be recognized as valid or binding until the same is made upon the stock books of the Company. Stock books shall be closed for transfer of stock, or payment of dividends, not less than ten days before election, or dividend date. All subscribers of stock and all who acquire stock by purchase or otherwise, shall be deemed members of this corporation.

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Article VI.

This act of incorporation may be changed, modified or altered or said corporation may be dissolved, with the assent of three-fourths in amount of the capital stock thereof, at any general meeting of the stockholders of the corporation for such purpose after thirty (30) days' notice of such meeting shall have been published in one of the daily newspapers of the City of Shreveport.

Article VII.

Whenever the corporation is dissolved, either by limitation or by any other cause, its affairs shall be liquidated under the superintendence of three stockholders to be appointed for that purpose, at a general meeting of the stockholders convened after thirty (30) days' previous notice shall have been published in one of the daily newspapers of the City of Shreveport, and with the assent of three-fourths of the capital stock.

Said Commissioners shall remain in office until the affairs of the said corporation shall have been fully liquidated and in case of the death of one or more of the said Commissioners, the survivor or survivors shall continue to act.

Article VIII.

William Edenborn, P. McIlvried, W. F. Taylor, Clarence Ellerbe, John E. Cole, Sarah Edenborn and Otto Mann with William Eden-

born, as President, and P. McIlvried, as Vice-President, and W. T. Taylor, as Second Vice-President, and Clarence Ellerbe, as Secretary & Treasurer, shall constitute the first Board of Directors of this Corporation, and shall continue in Office until the next annual election for Directors or until their successors shall be elected and installed.

This done and passed at my office in the City of Shreveport, State and Parish aforesaid, the day, month and year first above written, in the presence of J. J. Tippin and H. W. Bechtell competent witnesses, residing in this City, who have hereunto signed their names with appearers, and me, Notary after reading the whole.

WILLIAM EDENBORN.
P. MCILVRIED.
W. F. TAYLOR.
CLARENCE ELLERBE.
JOHN E. COLE.
OTTO MANN.
SARAH EDENBORN,
WM. EDENBORN.
ALLEN RENDALL,

Authorized by

Notary Public.

Witnesses:

J. J. TIPPIN.
H. W. BECHTELL.

I hereby certify that I have examined the above and foregoing Charter or Act of Incorporation, and finding nothing therein contrary to law, I hereby approve the same.

This the 9th day of May 1903.

J. R. LAND,
District Attorney,
First Judicial District of Louisiana.

The undersigned hereby subscribe to the Louisiana Railway & Navigation Company, the number of shares set opposite our names.

P. McIlvried	300 shares
Clarence Ellerbe	200 shares
William Edenborn	4,700 shares
W. B. Helm	50 shares
W. F. Taylor	120 shares
Otto Mann	70 shares
Thomas B. Coles	20 shares
John E. Cole	20 shares
M. R. Collins	20 shares
Sarah Edenborn, authorized by Wm. Edenborn	500 shares

Subscribed before me, this 9th day of May 1903.

ALLEN RENDALL,
Notary Public, Caddo Parish, La.

(Endorsed:) Filed and Recorded May 9th, 1903. F. C. O'Leary,
D'y Clerk and Ex Officio D'y Recorder.

STATE OF LOUISIANA,
Parish of Caddo:

I hereby certify that the above and foregoing is a true and correct copy of the original act, as the same now appear on file and of record in my office.

Given under my hand and seal of office this 27th day of July, 1908.

(Signed)

A. J. HARDIN,
D'y Clerk and Ex-Officio Recorder. [SEAL.]

480 EXHIBIT MARKED "B-12" (Memorandum).

Offered in Evidence by Counsel for Defendant.

Filed April 19, 1909.

Item 1. Belt Connection and P. & S. property.....	\$232,480.00
2. Filling Poydras Ditch.....	44,266.14
3. Bonds Deposited.....	52,195.00
4. All other City Terminal Expenses.....	832,588.53

Total City & Belt Terminals.....	\$1,161,529.67
5. Cost of Line Baton Rouge to New Orleans.	1,685,000.00

Total paid out..... 2,846,529.67

Interest on City Terminals 6% for 3 years.....	209,075.34
Interest on Baton Rouge-New Orleans Line 6% for 3 years.....	303,300.00
	512,375.34

Total including interest..... 3,358,905.01

EXHIBIT MARKED "R-2" (Letter Dated New Orleans, May 26, 1906).

Offered in Evidence by Counsel for Defendant.

Filed April 19th, 1909.

NEW ORLEANS, May 26, 1906.

Mr. J. A. Saxton, General Agent, Louisiana Railway & Navigation
Company, New Orleans, Louisiana.

DEAR SIR: Referring to the deposit on November 10, 1905, by
the Whitney Central National Bank for account of the Louisiana

Railway & Navigation Company, of Fifty Thousand Dollars (\$50,000) Four Per Cent (4%) Bonds of the State of Louisiana. Please be advised that immediately after the receipt of said Bonds from the Whitney Central National Bank, we notified Martin Behrman, Mayor of the City of New Orleans, of this deposit, and that the Bonds were to be held by us in escrow subject to the terms and conditions of Paragraph C of section 3 of Ordinance 1997 N. C. S., approved by the Mayor September 4, 1903.

INTERSTATE TRUST AND BANKING
COMPANY,

(Signed) By HENRY M. YOUNG, *Trust Officer*.

481 *Police Report, Dated 7th Precinct, May 23rd, 1906.*

Offered in Evidence by Counsel for Defendant.

Filed April 19th, 1909.

7TH PRECINCT, *May 23rd, 1906.*

Hy. E. Landry:

Charged by Sergeants Louis A. Madere, Louis Leroy and Corporal Thos. E. Gregson, with Disturb- Peace Attempting to place obstructions in the public streets—destroying and interfering with public property.

Arrested May 16th, 1906 at 8:30 A. M.

(Signed)

HY. BERINUS, *Clerk*.

Tried & Discharged May 28/06.

Tax Receipt, Dated Feb'y 29, 1908.

Offered in Evidence by Counsel for Defendant.

Filed April 19th, 1909.

STATE OF LOUISIANA,
Parish of Orleans:

No. 6588.

State Taxes for 1907.

NEW ORLEANS, *Feb'y 29th, 1908.*

Received of The Pittsburgh & Southern Coal Co. Six hundred and fourteen & 25/ Dollars, amount of State and Orleans Levee District Taxes for the year 1907, on the property described on the reverse hereof in accordance with law.

State Tax	\$490.00
Levee Tax	98.00
Interest	23.50
Notices (11)	2.75
	<hr/>
	\$614.25

C. E. BABCOCK,
State Tax Collector, 6th District,
 Per PAUL STOLTZ,
Deputy. [SEAL.]

(Signed)

(On Back of Tax Receipt.)

Sixth Municipal District:

	Square No.	
Real Estate	68	\$12,000
Bloomdall	1	9,000
Hurstville	2	9,000
do.	3	9,000
do.	4	9,000
do.	5	5,000
do.	A	5,000
do.	B	10,000
do.	C	10,000
do.	D	10,000
do.	E	10,000
		<hr/>
		\$98,000

482 *Ordinance Granting Rights of Way, and Depot and Other Rights and Privileges, to the Louisiana Railway & Navigation Company.*

Offered in Evidence as per Written Agreement by Defendant.

Filed April 19th, 1909.

MAYORALTY OF NEW ORLEANS,
 CITY HALL, — — —, 1903.

No. —, New Council Series. Calendar No. —. By — — —.

An Ordinance Granting Rights of Way and Depot and Other Rights and Privileges to the Louisiana Railway & Navigation Company.

1 SECTION 1. *Be it ordained by the Council of the*
 2 *City of New Orleans, That the Louisiana Railway &*
 3 *Navigation Company, a corporation organized under*
 4 *the laws of the State of Louisiana, and domiciled in*
 5 *the City of Shreveport, its successors and assigns, is*

6 hereby granted the right to enter the City of New
 7 Orleans, and to construct, maintain and operate with
 8 steam, electric or other power, its line of railway
 9 tracks along, across and over the streets, highways
 10 and public places hereinafter mentioned, and to ac-
 11 quire for railway purposes by expropriation or other-
 12 wise, all property in the City of New Orleans needed
 13 for railway purposes, such as tracks, spurs, side-
 14 tracks, yards, water or oil tanks, shops, platforms,
 15 sheds, warehouses, roundhouses, coal shutes, loading
 16 bins, wharves, elevators, depots and other appropri-
 17 ate purposes, and particularly the property herein-
 18 after designated.

1 483 Sec. 2. Be it further ordained, etc., That said Com-
 2 pany, its successors and assigns, is hereby granted

3 the following rights of way in and through the City
 4 of New Orleans, to-wit:

5 (1) Commencing at a convenient point in the west
 6 line of the Parish of Orleans, Louisiana near the
 7 intersection of Protection and Oleander Streets, said
 8 Company shall have the right to construct, equip and
 9 maintain, two standard gauge tracks, with such turn-
 10 outs, cross-overs and switches as may be necessary,
 11 along, across and upon the following named streets,
 12 viz: Protection, Oleander, Livingston, Forshey, Live
 13 Oak, Olive, Cherry, Edinburg, Laurel Grove Hamil-
 14 ton, Palm, Holly Grove, Stroelitz, General Ogden,
 15 Palmetto, Eagle, Dixon, Monroe, Leondais, Joilet,
 16 Paech, Cambronne, Dante and the Shell Road, all of
 17 said streets being located in the Seventh Municipal
 18 District, to the New Basin Canal, thence across the
 19 New Basin Canal with a drawbridge at grade with
 20 the shell road, and across Florida Landing to and
 21 into square of ground designated by the municipal
 22 number 776, located in the First Municipal District;
 23 thence through said square to South Carrollton Ave-
 24 nue, and across South Carrollton Avenue to Poydras
 25 Canal or City Ditch; thence with as many tracks as
 26 it may choose to lay, along and upon said Poydras
 27 Canal or City Ditch in a southeasterly direction to
 28 Poydras Street at its junction with White Street,
 29 after filling said City Ditch as hereinafter provided.

30 (2) Commencing at said junction of White and
 31 484 Poydras Streets, said Company shall have the right
 32 to construct, equip and maintain one standard gauge
 33 track along and upon Poydras Street to Lafayette
 34 Street, thence along and upon Lafayette Street to
 35 South Claiborne Street; thence, with convenient
 36 curve, onto the neutral ground on South Claiborne
 37 Street, with as many tracks as it may chose to lay
 38 along and upon said neutral ground to Tulane Ave-
 39 nue, and with the necessary and convenient cross-

40 overs.

41 (3) Said Company shall have the right to con-
42 struct, equip and maintain, one standard gauge track,
43 from a point in the main line, at or near the junction
44 of Poydras and South White Streets, thence along
45 and upon the north bank of the New Basin Canal, also
46 known as Julia Street or Florida Landing to Liberty
47 Street, with the right to make switches and curves
48 from said track into its property, acquired and to be
49 acquired, as hereinafter set out.

50 (4) Said Company shall have the right to con-
51 struct, equip and maintain, one standard gauge track,
52 from the track provided for in the first paragraph of
53 this section, leaving the same at the junction of La-
54 fayette and Cypress Streets along and upon Cypress
55 Street to Liberty Street, with the right to construct
56 turn-outs and switches from said track into its prop-
57 erty, acquired or to be acquired, and to connect the
58 track provided for in this paragraph with the track
59 hereinabove provided for on Julia Street.

1 SEC. 3. Be it further ordained, etc., That whereas,
2 485 under Ordinance No. 1615, N. C. S., the New Orleans
3 & San Francisco Railroad Company, its successors or
4 assigns, have been granted the right to construct at
5 their own cost and expense, the double track Belt line
6 over the Belt reservation on the river front, from the
7 present end of the Public Belt on the upper side of
8 Audubon Park to Henderson Street, and under said
9 ordinance said Company dedicates said tracks to
10 perpetual public use, therefore under the Belt provis-
11 ions of said Ordinance No. 1615, N. C. S.:

12 The Louisiana Railway & Navigation Company is
13 hereby granted a right of way over the double track
14 Belt line and reservation on the River Front of the
15 City of New Orleans, from the upper limits of the
16 City of New Orleans to Henderson Street, upon the
17 following terms and conditions:

18 (a) That said Company shall pay to the City of New
19 Orleans the sum of Fifty Thousand Dollars (\$50,000).
20 Said sum to be deposited with the Fiscal Agent of the
21 City of New Orleans, to the credit of a special fund, and
22 said fund shall not be used for any other purpose than
23 the extension of said Public Belt line and the construct-
24 ion of said Belt tracks, switches, side tracks, spurs and
25 turn-outs, and the payment of the costs of right of
26 way for such Belt system. Said sum to be deposited
27 With said Fiscal Agent when said Louisiana Railway
28 & Navigation Company shall have operated its en-
29 gines, trains and cars over said Belt tracks, as pro-
30 vided in this ordinance, for a period of thirty days.

31 (b) That in consideration of the payment of the

32 486 above sum, the Louisiana Railway & Navigation
33 Company shall have the right to operate its own
34 locomotives, cars and equipment over the said Public
35 Belt from the upper city limits to Henderson Street,
36 provided that said Company and all railroads using
37 said tracks shall belt all cars to and from their re-
38 spective lines over all switches, spurs and sidings
39 forming part of the Public Belt tracks, free of cost.
40 (c) That in the event of the New Orleans & San
41 Francisco Railroad Company, its successors or as-
42 signs failing to build said Belt tracks from the upper
43 limits of the City to Henderson Street, the Louisiana
44 Railway & Navigation Company is hereby granted
45 the right and privilege to build said tracks and oper-
46 ate its trains, cars and traffic over said tracks
47 under all the provisions and terms of Paragraph 10
48 of Section 2 of Ordinance No. 1615, N. C. S., said Louis-
49 iana Railway & Navigation Company assuming the
50 obligation of the New Orleans & San Francisco Rail-
51 road Company under said Paragraph of said ordi-
52 nance, and being granted all the rights and privileges
53 of said New Orleans & San Francisco Railroad Com-
54 pany, its successors or assigns, under said Paragraph
55 10 of Section 2 of said ordinance. Such construction
56 of said tracks from upper city limits to Henderson
57 Street to be in lieu of the payment of \$50,000, referred
58 to in Clause (a) of this section.
59 (d) That in the event the New Orleans & San Fran-
60 cisco Railroad Company, its successors and assigns
61 shall from any cause complete only a portion of the
62 487 tracks from the upper side of Audubon Park to Hend-
63 erson Street, the Louisiana Railway & Navigation
64 Company, its successors and assigns, shall have the
65 right to operate its own locomotives, cars and
66 equipment over such portion of the tracks as is al-
67 ready built, and as may be built by the New Orleans
68 & San Francisco Railroad Company, its successors
69 and assigns, and for such privilege shall pay to the
70 City of New Orleans such proportion of the sum pro-
71 vided in Clause (a) of this paragraph as the tracks
72 so constructed and used by said Louisiana Railway &
73 Navigation Company bear to the whole length of the
74 tracks from the upper city limits to Henderson Street.
75 (e) Unless otherwise ordered by the Public Belt
76 authority, or until said Public Belt authority is oper-
77 ating its own equipment over said tracks, the Louis-
78 iana Railway & Navigation Company agrees to belt
79 cars belonging to connecting railroads or to individ-
80 uals, firms or corporations, over the belt line and over
81 all switches, spurs and sidings connected therewith
82 and forming part thereof without discrimination

83 treating and handling such belted cars as justly and
84 as equitably as if they were its own cars, coming off
85 its own lines, charging for such services not exceed-
86 ing Two Dollars per car for placing a car and return-
87 ing same empty, or vice versa; provided, however,
88 that said Louisiana Railway & Navigation Company
89 Shall not be obliged to switch cars to or from the
90 tracks of any other railroad to or from any point on
91 said Belt tracks if such railroad refuses to per-
92 488 form a like service for the said Louisiana Railway &
93 Navigation Company at a like cost, and said latter
94 company shall have the right to charge the same
95 amount for switching cars to or from any other rail-
96 road to points on the Belt Tracks as such other rail-
97 road may charge said Louisiana Railway & Navigation Co-
98 mpany for similar service.

99 (f) That all controversies between the Louisiana
100 Railway & Navigation Company on the one side,
101 and the City or her Public Belt Authority, or any
102 other company or companies to which the City or
103 her Public Belt Authority may grant the use of said
104 tracks and appurtenances on the other side, relative
105 to the use of side tracks and appurtenances or the
106 cost of construction or maintenance thereof, or the
107 rules and regulations relative to the movement and
108 handling of cars, trains and traffic thereon and there-
109 over, shall be submitted to the arbitration of three
110 disinterested persons; one to be selected by said
111 Louisiana Railway & Navigation Company; the
112 second by the City or her Public Belt Officials, or
113 such other company or companies, as the case may
114 be; and the third by the two thus chosen; and the
115 decision of this tribunal, or any two of them, shall
116 have the effect of an amicable composition.

117 (g) That all damages to life and property caused
118 by the fault or negligence of the officers or employés
119 of any company, while operating over said Belt tracks
120 shall be borne exclusively by said company, and the

121 City shall in no respect be responsible therefor.
122 489 (h) That the Louisiana Railway & Navigation
123 Company, its lessees, successors and assigns, shall
124 not discriminate at any time, illegally or unjustly,
125 against the City of New Orleans.

126 (i) That the said Railway Company, its lessees,
127 successors and assigns, shall be bound to switch or
128 belt, without unreasonable delay over its main
129 tracks within the limits of the City of New Orleans,
130 and over all other tracks laid in the public streets or
131 public places within said City limits, owned, con-
132 trolled or leased by said Railway Company, its les-
133 sees, successors or assigns, except into the private

134 property or terminals of said Railway Company,
135 that is, depots, warehouses, elevators, and other like
136 terminals, owned or operated by the Railway Com-
137 pany, its lessees, successors and assigns, for a rea-
138 sonable compensation, not to exceed the maximum
139 charge of \$2.00 per car, its own cars and the cars
140 of any other railroad company now operating, or
141 which may hereafter operate, a line of railroad with-
142 in the City of New Orleans, also cars belonging to
143 individuals, firms or corporations, when such ser-
144 vice shall be requested, and no unjust discrimination
145 shall be made between different companies or indi-
146 viduals entitled to and requesting such service; pro-
147 vided, that said Railway Company, its lessees, suc-
148 cessors and assigns, shall not be obliged to switch
149 cars to or from the tracks of other railroad compan-
150 ies for a less sum than other railroad companies
151 charge it for a similar service, until such time as
152 490 other railroad companies operating in the City of
153 New Orleans agree with the City of New Orleans
154 upon a fixed switching or belting charge; nor shall
155 it be obliged to perform such service on its main
156 tracks for any railroad that refuses to perform the
157 same service for it on its main tracks and for the
158 same charges and under the same conditions. All
159 cars coming to the City over the lines of the Louis-
160 iana Railway & Navigation Company shall be deliv-
161 ered to points on its tracks free of belting charges.
162 (j) That the movement of trains, cars, and traffic
163 on and over said tracks from the upper limits of the
164 City to Henderson Street, until the City completes
165 her Belt system to Clouet Street, and begins to oper-
166 ate them as a part of said system, shall be under the
167 joint direction, control, and management of the
168 New Orleans & San Francisco Railroad Company,
169 its successors and assigns, and the Louisiana Rail-
170 way & Navigation Company, its successors and as-
171 signs, unless during this period the Public Belt
172 Authority shall grant other railroads a right of
173 operation over said tracks similar to that herein
174 granted to the Louisiana Railway & Navigation
175 Company, in which event the control and manage-
176 ment of movement of trains, cars, and traffic over
177 said tracks, to Henderson Street, shall be under the
178 joint control of such companies as may be granted
179 the same right of operation over said tracks as
180 when the City shall begin to operate said tracks as
181 part of her completed Belt system, the movement of
182 491 trains, cars, and traffic on and over said tracks shall
183 be under the sole direction, control, and manage-
184 ment of the Public Belt Authority of the City of New

185 Orleans, provided always that there shall be no dis-
186 crimination against the trains, cars, and traffic of
187 the Louisiana Railway & Navigation Company or
188 any other company, granted the right to use said
189 tracks. Until the City begins to operate said tracks
190 as a part of her completed Belt system, the cost of
191 maintenance, operation, and management shall be
192 borne jointly by the New Orleans & San Francisco
193 Railroad Company, its successors, and assigns, and
194 the Louisiana Railway & Navigation Company, its
195 successors and assigns, on a wheelage basis, unless
196 during this period the Public Belt Authority shall
197 grant to other railroads a right of operation over
198 said tracks similar to that herein granted to said
199 Louisiana Railway & Navigation Company, in
200 which event the cost of maintenance and the usual
201 and proper parts of the cost of operation and man-
202 agement shall be borne on a wheelage basis by all
203 companies operating over said tracks. If, however,
204 the Belt is not completed to Clouet Street by July
205 1st, 1907, the sole control and management of said
206 Belt tracks shall revert to the Public Belt Authori-
207 ties of the City of New Orleans; provided, always, if
208 for any reason the City of New Orleans or her Public
209 Belt Authorities shall not assume control and man-
210 agement of said tracks on July 1st, 1907, the Louisi-
211 ana Railway & Navigation Company shall have the
212 492 same right of control and management of the move-
213 ment of trains, cars, and traffic over said tracks as
214 has heretofore, or may be hereafter granted to any
215 railroad company.

216 (k) That in the event said Belt tracks shall be
217 completed to Clouet Street, and said Louisiana Rail-
218 way & Navigation Company shall desire to use that
219 portion of the Belt which may be built from Hender-
220 son Street to Clouet Street, it shall have the right
221 to operate its trains, cars, and traffic over the com-
222 pleted Belt, upon the payment to the Fiscal Agent of
223 the City for the use and benefit of the Belt Fund,
224 of a sum which, added to the sum to be paid under
225 Clause (a), Section 3, of this ordinance, shall make
226 the total sum paid by said Louisiana Railway &
227 Navigation Company, equal to the cost of the con-
228 struction of the Belt tracks from the upper side of
229 Audubon Park to Henderson Street, expended by
230 the New Orleans & San Francisco Railroad Com-
231 pany, its successors or assigns, in the construction of
232 said tracks from the upper side of Audubon Park to
233 Henderson Street, as provided in Ordinance No.
234 1615, N. C. S.

1 SEC. 4. Be it further ordained, etc., That the said

2 Company shall have the right to acquire, by expro-
 3 priation or purchase, the eighteen squares of ground
 4 designated by the Municipal Number Five Hundred
 5 and Ninety-Nine (599), Five Hundred and Eighty
 6 eight (588), Five Hundred and Seventy-three (573),
 7 Five Hundred and Sixty-One (561), Five Hundred
 8 493 and Forty-four (544), Five Hundred and Thirty-one
 9 (531), Five Hundred and Fifteen (515), Five Hun-
 10 dred and Two (502), Four Hundred and Ninety-two
 11 (492), Four Hundred and Seventy-nine (479), Four
 12 Hundred and Fifty-nine (459), Four Hundred and Fo-
 13 rty-five (445), Four Hundred and Twenty-six (426),
 14 Four Hundred and Eleven (411), Three Hundred and
 15 Ninety-five (395), Three Hundred and Seventy-eight
 16 (378), Three Hundred and Sixty-one (361) and Three
 17 Hundred and Forty-six (346), all being situated in the
 18 First Municipal District of the City of New Orleans
 19 and lying between Julia, Liberty, Cypress and Poydras
 20 streets, and the intersection of Poydras and Julia
 21 streets at White street; also all of those fractional
 22 blocks, or squares of ground lying between Lafayette
 23 and Cypress streets from South Galvez to South Clai-
 24 borne street, viz: Numbers Five Hundred and Fifteen
 25 and one-half (515½), Five Hundred and One (501),
 26 Four Hundred and Ninety-three (493), Four Hun-
 27 dred and Seventy-eight (478), and Four Hundred
 28 and Sixty (460), and the fractional blocks or squares
 29 of ground lying between Poydras and Lafayette
 30 streets from Rocheblave to Galvez streets, viz: Five
 31 Hundred and Sixty (560), Five Hundred and Forty-
 32 five (545), and Five Hundred and Thirty (530), and
 33 upon the property so acquired, to construct, establish
 34 and maintain all facilities of every kind and nature,
 35 necessary, appropriate and convenient for its railway
 36 purposes, such as car-yards, car-sheds, shops, round-
 37 houses, coal yards, bins and chutes, freight sheds and
 38 494 warehouses, elevators, loading and unloading plat-
 39 forms, car and freight depots and their appurtenances;
 40 and to this end, for these purposes, to lay tracks across
 41 the following streets between Cypress street and
 42 Julia street, or Florida Landing, viz: Tonti, Miro,
 43 Galvez, South Johnson, South Prieur, South Roman,
 44 South Derbigny, South Claiborne, Willow, Clara,
 45 Magnolia, South Robertson, Freret and Howard
 46 streets, and also across the following streets between
 47 Lafayette and Cypress streets, viz: South Johnson,
 48 South Prieur, South Roman, South Derbigny, and
 49 South Claiborne streets; and also across Miro and
 50 Tonti between Lafayette and Poydras streets, and
 51 also across the following streets between Poydras
 52 and Julia streets, viz: South Rocheblave, South Dor-
 53 genois and South Broad streets.

1 SEC. 5. Be it further ordained, etc., That nothing
4 railroad and terminals purposes, but it shall have the
3 said Company to the property herein mentioned for
4 railroad and terminals purposes, but it shall have the
5 right, from time to time, to extend its terminal area,
6 and to acquire as many squares of ground adjacent
7 to the squares and routes herein specified as its busi-
8 ness may require, and to connect said property by
9 tracks and switches to the routes and property herein
10 set forth, and for that purpose to extend its switches
11 and tracks along and across intervening streets to
12 reach all such additional property acquired for termi-
13 nal purposes. It shall further have the right to con-
14 struct switches and side-tracks into industries that
15 495 may be, from time to time, established adjacent to its
16 routes, and terminals properties, and to cross and use
17 the intervening streets for such tracks. The words
18 "adjacent squares" or "adjacent property" in this
19 section shall be constructed to mean only such squares
20 or property as are separated from the property or
21 routes of said Company by the width of a single inter-
22 vening street. The said Company shall also have the
23 right to connect, by all necessary and convenient
24 switches and turnouts, its property and terminals on
25 the Mississippi River, now acquired or hereafter to
26 be acquired, with the double track belt line and reser-
27 vation on the river front of the city.

1 SEC. 6. Be it further ordained, etc., That said
2 Company shall have the right to construct, maintain,
3 and operate a Union Passenger Depot on the neutral
4 ground on South Claiborne street from Tulane Ave-
5 nue to the east side of Perdido street, with the right
6 to construct train sheds across Gravier street and to
7 close said Gravier street with gates while trains of
8 said Company shall be standing on said neutral strip.
9 This grant is made on the following conditions:

10 (a) That a Union Passenger Depot, with all the
11 necessary appurtenances shall be constructed, the
12 cost of which is to be not less than fifty thousand dol-
13 lars, and the plan of which is to be approved by the
14 City Council.

15 (b) That nothing but passengers, baggage, mail
16 and express matter shall be handled in and out of said
17 depot, or over said neutral ground on South Claiborne
18 street.

19 496 (c) That the said Company shall permit other
20 railroads to use said depot and the tracks on said
21 neutral ground on said South Claiborne street for
22 passengers, baggage, mail and express purposes only,
23 and also to use said Company's tracks approaching
24 said depot, upon such terms and conditions as the
25 said Company and the using Company may agree

26 upon.

1 SEC. 7. Be it further ordained, etc., That, with
2 the permission of the Board of Control of the New
3 Basin Canal and Shell Road, said Company shall have
4 the right to lay switches and side-tracks along the
5 banks of the New Basin Canal for the purpose of the
6 interchange of traffic between the same and the road
7 of said Company.

1 SEC. 8. Be it further ordained, etc., That said
2 Company shall have the right and privilege to set up
3 telegraph and telephone poles along the rights of
4 way and tracks herein granted, and to string wires
5 over, across and along the public highways aforesaid,
6 such poles and wires, however, not to impede or obstruct
7 unnecessarily the use of such public highways.

1 SEC. 9. Be it further ordained, etc., That all of the
2 above tracks laid along and across the public
3 highways shall be laid on lines and grades to be ap-
4 proved by the City Engineer, and shall be so laid and
5 maintained as not to interfere with or obstruct the
6 drainage of the city, or the reasonable use of the said
7 streets. Cars shall not be parked on tracks construct-
8 ed along the highways aforesaid, nor shall they stand
9 497 or be parked so as to obstruct any cross street. No
10 structure shall be built by said Company conflicting
11 in any way with the present or proposed system of
12 Sewerage, Drainage, or Water Works, until a plan
13 of the same has been approved by the Drainage Com-
14 mission or Sewerage and Water Board, or their suc-
15 cessors, through the properly authorized officer of
16 such Board or Boards. Such approval of plans, how-
17 ever, shall not operate in any way to relieve the said
18 Louisiana Railway & Navigation Company from re-
19 sponsibility for any damage which may be caused
20 to the works of the said Boards by the construction
21 or operation of its system.

1 SEC. 10. Be it further ordained, etc., That all
2 streets through and across which the tracks of said
3 Company are laid shall be kept in good order and
4 condition between the rails and two feet on each side
5 thereof. All pavements taken up in the laying of
6 such tracks shall be relaid at the Company's cost to
7 the satisfaction of the City Engineer and the Com-
8 missioner of Public Works, and shall be thereafter
9 maintained between tracks and for two feet on each
10 side thereof. On all streets not now paved, which
11 may hereafter be paved by the City, the said Com-
12 pany shall pay the cost of paving between the rails
13 and two feet on each side thereof, and the same rule
14 shall apply to the renewal of pavements on streets
15 now paved.

1 SEC. 11. Be it further ordained, etc., That between

2 White street and Liberty street and Lafayette street
3 498 and Tulane Avenue, the speed of the trains of said
4 Company shall not exceed ten miles per hour; and
5 between White street and the City limits, it shall not
6 exceed twenty miles per hour.

1 SEC. 12. Be it further ordained, etc., That said
2 Company shall begin construction work within the
3 City of New Orleans within six months from its ac-
4 ceptance of this Ordinance.

1 SEC. 13. Be it further ordained, etc., That said
2 Company shall, at its own expense, fill, with suitable
3 material, the old Poydras Drainage Canal, or City
4 ditch, from Rocheblave street to Carrollton avenue.

1 SEC. 14. Be it further ordained, etc., That all
2 grants and privileges herein given are made for the
3 period of the Charter of said Company, its successors
4 and assigns.

1 SEC. 15. Be it further ordained, etc., That nothing
2 in this ordinance shall be construed as a restriction
3 upon the lawful and reasonable exercise of the police
4 power of the City of New Orleans over said Company
5 and its operations within the limits of the City of
6 New Orleans.

1 SEC. 16. Be it further ordained, etc., That this
2 Ordinance shall be accepted within sixty days from
3 the date of its promulgation by a resolution of the
4 Board of Directors of said Company, and by an act
5 before the City Notary, and when so accepted shall
6 be a contract between the City of New Orleans and
7 said Company, its successors and assigns.

499 *Agreement as to Transcript. Filed April 19th, 1909.*

Civil District Court, Parish of Orleans, Division "C."

No. 79743.

MARTIN BEHRMAN, Mayor.

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

In the above case it is agreed between counsel for plaintiff and counsel for defendant that the records in the cases of Capdevielle, Mayor, vs. New Orleans & San Francisco Railroad Company and Board of Port Commissioners of the City of New Orleans vs. New Orleans & San Francisco Railroad Company be considered as part of the evidence in this case and that the record in the District Courts shall be used as part of the evidence without having same actually copied into this record and the records of those cases in the Supreme Court shall be used as part of the record in this case.

In other words, no transcript of either of said records shall be necessary but that either party may refer to any portion of same

either in the District Court or in the Supreme Court, and the judges of both courts are to use said records, the same as if they were actually a part of the record in this case.

It is the recollection of counsel for the City that he offered in evidence all the documents and minutes of the City Council and its Committees, which were prepared in connection with the consideration of Ordinance 1997, N. C. S. But if it should develop that he overlooked any of same in making his offers, it is agreed that every document and paper connected with the passage of said Ordinance is filed in evidence and may be produced by either party.

Agreed to and signed and filed as part of the record in the above styled and numbered case on this the — day of April, 1909.

(Signed) SAM'L L. GILMORE,
GARLAND DUPRE.

(Signed) *Attys for City of N. O.*
FOSTER, MILLING & GODCHAUX,
WISE, RANDOLPH & RENDALL.
Attys for Def't.

500 *Official Pamphlet of the Public Belt Railroad Commission,
City of New Orleans.*

Offered in Evidence by Counsel for Defendant to be Annexed to a
Bill of Exceptions.

Filed April 19th, 1909.

500a [On cover:] The [cut of a key] to the Commercial Situation. A publicly owned and publicly operated belt railroad.
New Orleans, La.

500b Public Belt Railroad Commission, City of New Orleans.

Created by Ordinance No. 2683, N. C. S., Adopted October 4th,
1904; Approved October 8th, 1904.

Martin Behrman, Mayor, President.
James W. Porch, Board of Trade, President pro-tem.
Henry B. Schreiber, Board of Trade.
J. Henry Lafaye, Board of Trade.
Norman Eustis, Cotton Exchange.
Sol Wexler, Cotton Exchange.
Wm. B. Bloomfield, Sugar Exchange.
Jos. L. Love, Sugar Exchange.
T. F. Cunningham, Progressive Union.
Albert Godchaux, Progressive Union.
Gaspar Cusachs, Mechanics, Dealers & Lumbermen's Ex.
T. M. Thompson, Mechanics, Dealers & Lumbermen's Ex.
James D. Hill, At Large, Upper Districts.
Wm. P. Ross, At Large, Upper Districts.
John B. Meyers, At Large, Upper Districts.

James Thibaut, At Large, Lower Districts.
 Alfred G. Gillis, At Large, Lower Districts.
 Sam'l L. Gilmore, City Attorney, ex-officio Attorney.
 Wm. J. Hardee, City Engineer, ex-officio Engineer.
 Arthur McGuirk, Special Counsel.
 Hampton Reynolds, Assistant Engineer.
 Frank H. Joubert, Secretary-Treasurer.

500c *Preface.*

In offering this, the first official pamphlet of our Commission we respectfully call attention to the map within.

By referring to this it will be noted that a Belt Railroad, publicly owned and publicly controlled, now under construction, taps every trunk line at suburbs.

It connects up every wharf, it reaches back of town; it makes a perfect local condition that will mean future development along the lines of perfect use, of existing facilities and thorough development of heretofore inaccessible locations for manufactories.

It means the connecting link that will serve our interests within our city limits.

It means that no trunk line connected with trans-atlantic lines enjoying privileges that we have given them as fixed franchises can operate to our detriment.

It means that whatever anybody else enjoys through the means of our natural advantages will be equally enjoyable by us.

It means that any factory or industry with but one track into their place of business will thereby be perfectly accessible to every track of every trunk line that comes into the Parish of Orleans.

It means that no development, however broad or comprehensive, on the part of the trunk lines, can be selfish.

It means the absolute protection of our every advantage for importers, exporters, manufacturers, wholesalers and shippers, whether local or otherwise.

It means protection of every remote or nearby industry within the city limits on an equal basis regardless of our street or drayage conditions.

It means the proper handling of our car lot and less than car lot business to the various trunk lines steamship wharves and industries, at a minimum of cost that makes the maximum of possibility.

To accomplish all that our Commission is expecting simply requires the proper development of civic pride. We are confident and intense in our purpose and do not fear the final result, but we appeal to the local interests to help the development for immediate use rather than for our children and grandchildren. There is nothing like the present and there is nothing like development of opportunities at hand.

500d We have heretofore given liberally to every railroad asking for privileges in this city. We have gone to the extreme of liberality.

We are now but demanding our rights and in the midst of giving we ask to also be given on the part of the transportation companies

that are serving us. We now ask that they be reciprocal and accede to us that community of interests that will make us just as secure and just as perfect in position as the privileges which we have freely given them make others without our limits.

It should be borne in mind that we are the gateway of the Mississippi Valley, the nearest connecting link to the Panama Canal and in the very near future, therefore, the natural gateway to the far east, which we must control by using local conditions and making trunk line situations terminating here accessible to us.

The city's power and might back of this undertaking, headed by Hon. Martin Behrman, the Chief Executive of the City, who is Ex-officio President of our Commission, naturally insures its success.

Our Commission is created by the City Council and is receiving its unqualified support.

The City Attorney and the City Engineer, in their respective capacities, are officers of this Commission and their advice and assistance has been exceedingly valuable.

There is no railroad terminating in this city but that depends upon the municipality for privileges, and the extensions of those that they now enjoy. The city now being in a position to exact proper consideration on the part of these great companies in the interchange of business among themselves and their patrons, gives us a leverage that is bound to maintain our local rights for the benefit of all.

The effort of the Commission is entirely public spirited, absolutely for the benefit of every taxpayer and every person living within our limits.

Often in the hurly burly of getting rich quick, our citizens neglect the cardinal things which protect them most. Politics and political interests they disavow, sometimes failing even to secure their poll tax, thus knowingly disfranchising themselves.

In this case, as a purely commercial proposition, we beg to direct attention to the following pages. They speak for themselves louder and more emphatically than we could if we were elevated even to a house top position.

This pamphlet is standard literature for New Orleans development and should not be consigned to a pigeon hole or carelessly thrown aside, but read and studied and pondered over, so that each citizen interested in greater New Orleans will become an advocate of the principle that we inculcate in this advanced pamphlet of Belt Line public ownership.

JAMES W. PORCH,

President Pro-tem,

500f *Objects and Aims of a Publicly Owned Belt Railroad.*

In every large city the means of using its terminal facilities, that are afforded non-residents and outsiders, are awkward.

Cities do not become so in a day, and those that make a study of transportation and have built up the great trunk lines, that in turn have, to a great extent, built up great cities, have been the first to

see the necessity for large and comprehensive terminals and have not been slow to ask for not only all that they need for the immediate present; but, with careful eyes to the future are ever seeking facilities that will be equal to the growing importance of their system as time passes.

The impression becomes general that the importance of the great trunk lines is so great to the public that there is nothing that they can ask for locally, but should be granted.

In turn other roads seek the same privileges and try to outrival their rivals and use the prestige established by former gifts in securing their own, with the result that when a metropolis becomes really great it begins to realize that most of its best facilities for use of its own home patrons have been given away—great freight terminals in various parts of the city, magnificent wharves and freight depots, scattered at great distances apart and in no manner connected up, all serving the purpose for which they were constructed—for those living along the lines that operate them, but of no real practicable value as a united whole to those who live nearest them and who pay the taxes that maintain the cities where these facilities are.

It would be easy to name a dozen of the most important cities of the United States that are in this fix to-day.

Their residents point with pride to the numerous trunk lines, to the magnificent harbors, to the great shipping facilities to most of the ports of the world and yet when you begin analytically to study the real facts as they are you will find that the resident manufacturer, exporter and importer, large merchant and shipper, is handicapped to no little extent because of the inability to use these terminals except at great disadvantage.

500g It is but natural that one railroad will not give up any of its facilities for the accommodation of any competitor or competitors.

If one railroad has the decided advantage over another, it is not to be supposed that it is going to offer free use of its terminal facilities to the one at a disadvantage.

It is also easily understood that in the early days of construction and development in all of our large cities that we did not use that forethought that those skilled in transportation used or had already used, and therefore we realize later that the handicap under which we suffer can only be cured by comprehensive belt line systems that will connect up these facilities and make them free, or practically so, to all engaged in commerce, manufactures or shipping of any kind or character.

In a competitive age like this, each city strives to outdo the other, and a superb railroad system has leveled distances and cost of transportation to such an extent that nearness to the field of operation, with great disadvantages in the way of terminal facilities, is more than offset by more distant cities with perfect facilities to ship and reach distant points by any or all of the competing lines seeking the business.

There are a number of cities that have perfect belt line systems

under private ownership that have done more to build up their industrial life than the fact of having numerous trunk lines.

It is already held that no one having at his door free access to all of the means of shipping without extra or undue cost beyond a mere switching charge is better situated than one who simply has a switch and is served by one line of rail.

Indianapolis, Kansas City, Chicago and Toledo all bear testimony to this fact in such an incontrovertible way as to make our Commission more than eager for us to be classed with them in the way of proper belt line facilities.

New Orleans is the only city that has dedicated to perpetual public use a belt line system that is to be built by public money and operated by public officials.

When this Belt is completed it will be a double track system twenty miles in length, extending from the Upper Protection Levee down the river front to Kentucky Street, to the rear of the city and around it to the Upper Parish Line, thence along the Protection Levee to the point of commencement.

Every wharf, every freight depot and every important industry will be reached by means of switches.

500*h* It is proposed to take care of car loads and place the cars wherever needed and at the same time take care of less than car load shipments and distribute them to any of the depots or wharves in this city.

It is proposed to minimize the cost of transacting business to such an extent as to place us on a parity with any city extant.

It is proposed to eliminate drayage to the utmost of our ability and wipe out charges to such an extent as to make it the cheapest city in the country with which to transact business.

We have investigated this matter and find that wherever proper belt line service exists, the cost of shipping in and out of the city is so much less than where it does not exist as to make us realize the positive importance and necessity for the immediate construction of this Belt.

There is not one of our Commission who is not imbued with the importance of strict application to the work in hand until we have encircled this city with a perfectly constructed double belt track system.

We are pledged to it and feel confident that we have the entire support and co-operation of every shipper and manufacturer and enterprising citizen of this great city.

We intend to open up to manufacturers suitable sites in the rear of the city where they can have plenty of room to develop, and through our industrial commissioner we shall send broadcast to the world literature giving a full account of the possibilities for those locating along the line of the Belt, and tender our good offices in assisting them to get the best that is going for their money, in what we consider the best manufacturing location in the South.

Under the ordinance we propose to handle all the dredgings from the river, the sand from the filtration plant of the city when completed, and haul hundreds of thousands of yards of same to the

backs of the city to fill up the low places, making what is now marshes and ponds, attractive locations for manufacturing enterprises.

The only incentive that manufacturers need is a belt service and when we can give them cheap locations with all of the advantages that a comprehensive belt line system means, we will have solved the problem and we will have caused to come into this city, thousands upon thousands of skilled laborers.

There is not a progressive city in the United States to-day, but that is a great manufacturing center, and the Belt Commission realizes the fact that we must not only be in a position to comprehensively handle imports and exports, but we must also be in a position to handle our own production.

We must become a manufacturing city, the creators of wealth.

We must be in a position to be more self contained, and build up more largely on the products of our own brain and brawn.

We feel very much encouraged over the applications that have been made to us for switches and we are sanguine that New Orleans will be irresistible, not only because of our perfect harbor and shipping facilities, but because it is a twelve months' port and it is a twelve months' place for the manufacturer as well.

There is another feature which the Commission has often considered and which it desires impressed on the minds of the public, and that is, that a publicly owned Belt gives us absolute control over local conditions.

In this age of combinations, the more gigantic they are the easier they seem to be accomplished and it is not improbable that the railroads centering in New Orleans will be under one ownership, with the power to limit or circumscribe our facilities to such an extent as to practically make them nil.

A publicly owned Belt will forestall this and even though the roads would circumscribe the points of outlet by closing down some of the freight terminals, the service of the Belt would be yet just as complete; there would simply be fewer gateways.

We scarcely believe that enough thought has been given to the importance of this proposition by our own people and it seems but fitting that a little time and space should now be consumed to give to the public in general an idea of what a comprehensive Belt Line service means.

Here it is in a nutshell:—

If one is located along the line of the Belt he simply has empty and loaded cars put on and off of his switch, by giving notice to the nearest Belt Line Clerk, informing him of what cars are needed and the destination intended for the load.

If less than carload shipment is desired he calls the attention of the Belt Line Clerk to the fact that he wants a Belt Line car on his switch, wherein he can load any and every thing that he has to ship to any of the depots, wharves or industries in this city, and the Belt Line train will distribute it.

The party making the shipment will receive from the conductor of the Belt Line train a receipt which will to him be as a bill of lading for a purely local shipment, or if the ship-

ment is for a distance and the railroad bill of lading is necessary, this receipt will be transferable at the office of the railroad over which the shipment is made for such document.

Local business, of course, will be taken care of by cars that are owned by the Belt Line.

What could be more perfect or comprehensive for outbound shipments?

For inbound shipments, the Belt Line Clerk is notified that certain cars, giving their numbers and initials and points of shipment are expected at a certain Belt Line gateway at a nearby date.

Due record is made of this, and when the cars arrive as explained below, the number of the switches for which they are intended are placed on them and the very night or day of their arrival they are placed where they are to be unloaded.

If empty cars are needed the Belt Line Clerk is again consulted and told that certain cars are to be placed on certain switches at certain times.

The Belt Line Clerk would naturally ask for the destination and then it would be his business to see that these empties were furnished.

If for any reason the road that he applied to could not give the empties, and it happened to be, as it probably would be, a common point to which the shipment was destined, the competing road would be appealed to for the cars with the result that they could probably be had, and if failure should result in the second instance, it is more than likely that the third and fourth competing lines could be stirred into activity with the result that a healthy competition springs up with all of the trunk lines to serve the Belt Line patrons if they expect to get their business.

The Belt Line will accordingly become a freight producer and will begin in a measure to be a factor in the freight situation locally, and will thereby encourage the railroads to prompt service.

Each point of intersection of the trunk line is termed a belt gateway and at that point there is a transfer switch and cars destined to a point on the Belt are placed on that switch and at night the Belt Line engine places the cars where they belong and at the same time gathers up cars along the line of the Belt and places them on the transfer switch of the road for which they are intended, to be taken care of by the regular trains.

Every industry is located in what will be termed by the Belt Line service a zone and each switch is given a number.

500k When cars intended for distribution are placed on the transfer switch, the Belt Line Clerk simply attaches to some place provided, a number showing the switch for which it is intended, he first having furnished him the car initials and numbers by the consignee with the information as to where they are to be placed.

Now if these Belt Line gateways are decreased, the Belt Line service yet remains the same, simply having lesser outlets.

We have always taken the stand that our position will be as unique as a terminal proposition as it is possible to make it when it is considered that we are working in perfect harmony with two other pub-

lie bodies; one, the Port Commission, having entire charge of the wharves, and the other, the Levee Board in entire charge of our public Levee System.

With these three public bodies acting as one wherever the public interests are concerned there is nothing that we have to fear, either nearby or at a distance, and we will then have reached the position that we should have reached long ago as the recognized gate way of the Mississippi Valley.

It is not the lower rate that the shipper expects so much as a quick service, and where, you have access to any and all of the trunk lines you create a stimulus that brings prompt service because without promptness they will soon learn that they will not get the business.

No shipper in this city will fail to realize the importance of this position, and no local switch on any one line of road will be in a position to give any such service as local single switches of the Belt.

It will so revolutionize the method of handling freight that it will not be long before the congested condition at all of the freight terminals will be relieved since the traffic will be back of this city on long transfer switches built for the purpose, where the trains will be made up and where the cars destined for belt switches will be distributed.

We will then see the time when orders placed for empties and instructions for loaded cars to be placed or moved to or from one's place of business in the evening, will be executed before the opening of the next business day.

If this isn't worth the best effort of New Orleans' commercial life there is nothing that we are aware of that is.

The Belt Line protects forever another feature, and that is the entry into the city of any new trunk line that may want to come in the future.

500/ There cannot be that same struggle and that desire to grasp everything that we have in the way of facilities, because they will be fully and completely served by the Belt Line.

The Belt Line will place their cars wherever desired and bring them to their own rails at a less cost than they could possibly maintain their terminals.

It therefore will solve this problem for time to come and no trunk line can knock at the doors of New Orleans in vain.

At the same time that they are securing all that they need we are getting the full benefit of their coming.

It is a notorious fact that terminals of trunk lines always suffer as far as the purely local interests are concerned.

No railroad has the same interest in a shipper at the end of his line that he has for the one along it, and that very fact is one of the strongest reasons why, for our own protection, a Belt is absolutely necessary.

We propose to have the same sort of Industrial Commissioner to develop and exploit the Belt that railroads have to exploit their systems and we propose to as speedily as possible develop and build up the Belt so that its resources and freight connections will be of such volume as to cause the railroads to appreciate us.

We realize that the full benefits of this great undertaking cannot be accomplished without the full cooperation and accord of the railroad systems, and this we most heartily seek.

What could be better than a condition that would place an industry located back of the city in as perfect communication with and over every railroad that centers in this city; give us perfect access to every depot located here and every wharf of every transatlantic or other line of steamers as though it was located right next to the places themselves; the only cost in connection with the same being a mere bagatelle of two dollars per loaded car or thereabouts?

The pessimist has often said, in order to kill our effort, that after we build the Belt it will be a losing game to the city and the city will be in for an annual loss for its operation.

We have gathered data on this point and we know from facts and figures of other cities of not half the importance of New Orleans and with not half the future prospects of this city that they tell an untruth.

We are confident that it will prove a money earner and 500m. one of the most valuable assets that the city possesses to say nothing about the duty the city owes its taxpayers to give them facilities to do business.

Car congestion, causing delay in switching that every one now suffers from, and sometimes often to the extent of as much as two weeks will be remedied under Belt Line operation.

Every freight train reaching this city will cross the Belt at the suburbs.

There is no reason why any car intended for the Belt Line switches should go beyond these respective crossings and therefore the Belt Line service gets possession of the car for distribution the moment it reaches the city limits.

From any point of view you will find Belt Line service solves the problem whether for less than car lots or car lots, for promptness, for cheapness and for competition.

Competition is the life of trade and the Belt Line will create railroad competition that will be the healthiest thing that ever happened.

If any one railroad desires these cars and insists upon taking them into the city and if they are held for a period of days, the Belt Line shipper has his redress by simply calling their attention to this and giving them to understand that their roads will not be used if like treatment is to be accorded every time a shipment is made.

If the merchant has to meet all of the competition that exists and frequently fight for his very commercial existence why should not the railroads be classed in the same category and be made to yield the best service that their systems afford.

The Belt Line will be operated under the supervision of a Commission, and will be directly under the control, as far as its physical manipulation is concerned, of a skilled General Manager, selected for the purpose, from the best Belt Line operatives that we can get a pick from, and there will be nothing new or modern in actual

practical Belt Line services in any of the cities, but that will be adopted here.

We intend to exemplify the practical operation of public ownership along the best and most modern lines.

It might be interesting to note that since the Commission has taken charge, November 2, 1904, the entire survey has been made and typography taken, and now the work of construction is rapidly progressing.

To our friends across the river at Algiers and Gretna we desire to say that we have in contemplation a perfect system of car floats which, with the aid of a good strong tug, will enable us to give them a service on their side of the river that we are confident will be excellent.

We consider them a part of us and we intend to see that they get perfect access to the steamers along the river front and the railroads that terminate on this side of the river.

It would be well for the public to understand, that the entire front, as conditions now exist, are not open to us locally and shipments from some wharves are so difficult and inaccessible as to practically make the facilities nil.

Those who have tried it are aware of the conditions that exist and there is no need to enlarge on a bad matter to make it realized, suffice it to say, in this connection, that the Belt Line service will entirely eradicate this evil.

The Belt Line Commission desires to see the day, when, through the operation of the Belt Line service, our terminals and our facilities will be as free to us as they are to any shipper along the trunk lines centering here.

500o *Extracts from Addresses Delivered at Celebration of Inauguration of Construction Public Belt Railroad, at Harrison Line Sheds, Lafayette and River Front, Saturday, July 1st, 1905.*

500p Gov. Newton C. Blanchard.

"These three public instrumentalities—the Dock Board, the Levee Board and the Belt Line Commission—working in harmony and controlling the river front from the Jefferson Parish line to a point near the barracks, mean very much of good for your city.

"The Belt Line project means that every wharf and boat landing, every railroad terminal and most of the large private and corporate industries will have direct connection with all the railroad lines running into and out of the city, north, south, east and west. It means that as soon as the Belt Line this day inaugurated is completed the situation relative to transportation and the commerce of the city will be as well-nigh perfect as possible to make it. It means that for facilities for handling the city's commerce, for its hauling, for its shipments out, for its deliveries in, New Orleans will be abreast of the most, in this respect, advanced cities of the Union.

"It will mean a doing away with the drawback, the hindrance, the inconvenience now existing, resulting from the refusal of the railroads to interchange cars.

"It will mean to a large extent the abolition of private tracks now existing and which are permitted only to the cars of the roads controlling them. Hereafter all cars of all lines, without hindrance, partiality or discrimination, will find access to every wharf, every landing, every terminal, every convenient point for unloading and delivery, in the one case, and for loading and shipment in the other case. Every wholesale buyer and seller, every receiver and shipper, will have an equal chance to get his goods in or his goods out. No unreasonable delay, no begging for rights or conveniences that should be common to all, no discrimination—all served alike in the order of their coming.

"All these things will be realized when you have your Belt Line. Its operation will be under the control of your city government. That means you control, for you elect your city officials.

"Without the Belt Line, notwithstanding you are in a city where a number of trunk lines of railway terminate, you only have, for all practical purposes, the use of that line with which your switch may connect.

"This Belt Line is sorely needed to regulate conditions here and to make New Orleans a comprehensive seaport; one from which all parts of the country may be swiftly reached; one to which all parts of the country may have easy access.

"This Belt Line is needed to give you low-priced terminal facilities; to reduce the cost of getting products and goods and wares and all commodities to convenient points in the interior of the city, or from such points to the world outside your city. It is needed to multiply within the city such points of vantage and of convenience, and thereby to give to the many access to facilities that are now afforded to the comparatively few.

"It will place New Orleans on a par with other cities that have provided, or are now moving to provide for themselves the most modern and up-to-date facilities for the rapid and cheap movement and disposition of the multifarious things, the buying and selling of which, or the interchange of which, go to make up the business and trade and commerce of a city.

"Your Belt Line, too, will offer in the rear portions of the city, which it will traverse, numerous available sites for manufacturing plants, and just now one of the great needs of the city is manufactures. The Constitution of our State exempts from taxation for a given time the capital invested in manufacturing enterprises.

"This provision, together with the growing importance of your city as the commercial metropolis of the South, and the rapid increase in the population and wealth of the State and surrounding States, causes the New Orleans situation to offer to manufactures a most promising field. But with all this promise and the cordial invitation you make to them to come, they will not come unless assured of locations for their plants that will offer the advantages of easy and profitable access to all the lines of transportation—river and rail—

which are available in and near the city. This your Belt Line will give them.

"I am informed that heretofore, manufacturers desirous of coming here, seeking this city as a place of location for their business, have steadily refused to invest money in buildings and other permanent improvements in connection with their undertakings upon learning that they would have to locate along the line of one road only, with no sufficient opportunity of exchange of cars available to competitive points and competitive lines of transportation.

"Your Belt Line system will cure this evil; will entirely eliminate this difficulty.

"Your Belt Line, in short, means progress. It will demonstrate to the outside world what we in the State already know, that New Orleans has caught the spirit of progress; that a new life of increased business activity is on in the city; that whatever of lethargy may have been rightly charged against her past has been thrown off, and that the New Orleans of to-day is up and doing, awake to the immense possibilities opening up before her as the result of the construction of the Panama Canal, to which she is the gateway, going and coming, of that vast country north and northeast and northwest of her, even beyond the Canadian line, and as the result of her unrivalled position at or near the mouth of the great river, which is nature's highway (1) to bring down stream to her lap the diversified products of a tributary country of vast extent, unsurpassed in fertility of soil, in variety and richness of crops grown, and in balminess of climate, and (2) to bring up stream to her harbor the ships of all seas, freighted with the rich cargoes of all lands, seeking exchange in her marts of trade with those things grown and produced and manufactured better and more bountifully in our own land than anywhere else." * * *

Hon. Martin Behrman, Mayor of the City of New Orleans, ex-Officio President Public Belt Railroad Commission.

"FELLOW CITIZENS: This is an occasion of grave moment and great import to the commercial development of this metropolis. We are about to take the first step towards the realization of what all business men and persons interested in the welfare of New Orleans have recognized for years to be an absolute necessity. We are about to begin the actual physical work of constructing our public belt road. Its necessity made itself apparent to business men long ago.

* * *

"It was markedly noticeable that whatever differences of opinion might exist as to the municipal ownership of other public utilities, every one seemed to appreciate that a belt road owned, controlled and operated by the city was a necessity.

"We now have a commission in charge of the great undertaking, every member of which enjoys the esteem and confidence of the entire community. The earnest activity they have evinced since the organization of the Commission is proof positive that the right men

were entrusted with the great responsibility, for it can be generally accepted that it is almost entirely due to their earnestness, their activity, their high standing, their unimpeachable integrity, that we have assembled here to-day to witness the first step towards the actual work of constructing the road. Now the work will be pushed forward with the utmost rapidity and dispatch. The road will run along every wharf in the city; furnish railroad facilities to every industry without discrimination or delay; transfer all freight cars between all railways, and to and from all industries and warehouses, and provide the means for railroads now here and those that may come in the

future, to reach the river front. By rendering such service, 500r all railroads will seek the business coming from the Belt

Line and will appreciate its worth. The full benefits of the provision of the Constitution exempting factories from taxation for years will only be realized when we can give to factories a convenient and quick belting service. * * * I feel that there is no public project which will benefit the city as much as this proposed enterprise. I feel that it will be the means of locating factories, warehouses and other industries that are natural to a metropolis and seaport and will enhance values and increase the population of New Orleans, and for that reason I am impressed with the earnest belief that it must be constructed as early as possible."

James W. Porch, President Pro Tem. Public Belt Railroad Commission.

"Anyone engaged in commercial or manufacturing pursuits in a large way first seeks natural advantages, railroad and other facilities that will contribute to the success of the undertaking, but before making a definite decision, if he is wise, he is bound to look first into the matter of cost in handling of his business. Frictional charges and local expenses that are useless and altogether out of keeping for a metropolis like this are sure to be the death knell of any well-regulated business house intending to locate in this city.

"The question is—how are we prepared to meet the competition of our growing nearby cities? How are we prepared as an export proposition to meet the large cities of the Atlantic seaboard?

"My opinion is that we are not at all prepared under present conditions. If the Belt Line that we are inaugurating the commencement of to-day is built as proposed by the Belt Line Commission, I feel confident that we will be nearer a perfect mercantile and manufacturing condition than any other city on this continent. * * * It is generally admitted that we have finer facilities than any city in the South. It is also generally admitted by those who are posted that these facilities are for others rather than for ourselves, based on the fact that we have no connection with our own wharves, and with the freight depots of the different trunk lines terminating here.

"Less than carload shipments are practically impossible at this time to be handled at a price that will meet competition.

"Switches to private enterprises are few, and where they have them they are ineffective.

"You now are under one of the new sheds of the Dock Commission, where but a few short months ago there was a ravine, in front of which were tied up decayed and unused barges that were heretofore in the Mississippi River service. Where they were moored you now see discharging cargoes the gigantic leviathans of the sea.

"Too much cannot be said of the well-applied effort of the Dock Commission. They have for some time realized the importance of a Belt Line service. * * * It is proposed by the Belt Line Commission to construct as speedily as possible a double track Belt Line system that will completely encircle the city, the length of which will be a matter of twenty-two miles. The track will leave the river front at Kentucky Street and reach the back of town through Florida Walk, thence through other and various streets until the parish line of Jefferson is reached, and then will follow the Upperline Canal to the river front, and connect with that part of our belt above Audubon Park that is already constructed.

"We will haul all of the excavations from the river by the Dock Board to the back of town for filling. We will also handle all of the out put of the filtration plant, and from the gigantic water works that the Sewerage and Water Board are about to construct.

"Through these means we will bring into value and use thousands and thousands of acres of land that are now but a marsh. We will open to manufacturing industries cheap sites that can be built up for a reasonable cost, and that will be extensive enough in their scope to permit of development along the broadest lines. These industries will be perfectly served by a Belt Line connection, and their requirements and their output taken care of and delivered to the various trunk line gateways at a minimum of cost. * * * No manufactory or industry can be expected to locate in our city and pay expenses incident to the same unless they can be given complete and perfect access to all of the shipping facilities that we have at a proper cost. It is perfectly useless to expect anybody to place their business in a seaport city on the switch of a single line of road without being able to enjoy the facilities of the other roads.

"Our belt line system will entirely eradicate this great impediment and will make everyone who has a switch track connect with the Belt that has free access to all trunk lines, with all depots and with all of the wharves of the city. * * * Homes, businesses, material values of every kind and character will be enhanced and made more stable. It will make possible the growth of manufacturing industries to such an extent as to increase our payrolls to the proper proportions for a city of this size, and make us, because of the fact that we create wealth, more self-contained in times of depression. It will make us factors in the commercial world that the absence of manufacturing industries does not give.

"It will enable us to locate extensive forwarding warehouses for the disbursement of manufactured products and tropical produce.

"It will make us the emporium of export between the great countries of the South and Central Americas and the Mississippi Valley.

"It will put us in a position to comprehensively do the business

as importers, exporters and manufacturers, and not through the middlemen, as heretofore, and when the Belt Line is completely constructed, we will be placed in a position, if we can reach that stage of development, where we can set the pace for all our commercial rivals.

"We are but claiming our own; we have a twelve months' port. We have an abundance of raw material of every kind; we are near to the markets of large consumption, and there is no reason why we should not be the first in the race.

500*t*

Bernard McCloskey.

"The city of New Orleans, for a period extending over twenty years, has been at great disadvantage owing to the conflicting interests that often arise among the common carriers in the delivery of merchandise in the city. It is a fixed rule among the common carriers that no obligation rests upon them to switch merchandise to any point on the river front, except the merchandise coming over their lines; that is, that from the initial point the merchandise should pass over the particular common carrier, otherwise no obligation is imposed upon the carrier to transfer or switch the merchandise as desired by the various interests of the city. It is to such a principle as this that is due the necessity of a belt railroad here, a principle that has to a degree placed the merchants and the manufacturers often in jeopardy. The uncertainty of delivery at the manufacturing point, or at the warehouse of the various merchants has hampered to a great degree the growth of the various interests of the city. It is to overcome this principle contended for by the common carriers that the belt railroad is indispensable.

"The city of New Orleans has made rapid progress on the Banks of the Mississippi River; great works of public improvement are being pushed forward; on its banks great sheds have been erected and wharves greater in extent than have ever been known, dredges lie in the harbor to deepen it; fire-boats will watch and guard its commerce, and from old and antiquated conditions existing at its wharves, we have come step by step to adopt modern methods.

"The belt railroad is as essential to the life of the manufacturing, warehouse and industrial New Orleans as the Mississippi River itself is to its growth. By belting the city with this iron girdle manufacturing establishments of all kinds can be placed along the lines; property in the rear of the city on the line of the belt will be as valuable for manufacturing purposes as at any point on the river front, and the front will be to a degree relieved of the demand to locate simply in that territory.

"But like all great enterprises, the belt railroad has had to overcome many obstacles. It has required the industry and push of distinguished citizens to keep it before the City Council and the Legislature of the State, and to crowd it to the front through the press or otherwise. The Belt Railroad Commission has not always been a popular body in the city; indeed, it is but recently that it has had the united press to advocate the construction of such a belt railroad.

"Like all measures of reform, it has established itself slowly but surely, and the golden spike driven to-day is but the first gun, as it were, which put into practical effect the objects of the Commission.

"The various common carriers entering the city have been in individual conflicts, just as the merchants and other interests have and it is to unite these conflicting positions of the common carriers that this belt railroad is to a degree necessary.

"I will not describe in detail the benefits to be derived from the belt railroad; the banks of the Mississippi River are the streets of the world. The first principle of law written in the treaty between France and the United States is that these banks should be free. Banks are understood legally to include all the space necessary for the general commerce, and any attempt to own the banks so as to confer private ownership on individuals and corporations has been met with this elementary principle. There can be no private ownership in the banks of the Mississippi River; the belt railroad is to be on the banks of the river. It is written in the grant to the belt railroad that it cannot be subject to private ownership, in any shape or form, and the approval of the sister bodies, the Orleans Levee Board and the Board of Commissioners of the Port of New Orleans each contain this distinct clause. It was a clause no doubt made necessary by the exigencies of the commerce of this port. The necessity to impress upon individual citizens that the river banks are free, and that this included all the space, as already stated needed for commerce, has not at all times been successful. It is doubtful if the constitutional law of this State could write a clause by which the banks of the river could be bartered away. The United States
500u Supreme Court, in a recent leading case, laid down the principle that the banks of the Mississippi River, which includes everything necessary for commerce, was nothing more or less than the seashore, and we all know that we cannot own the seashore, and the banks of the Mississippi River is not different, to my mind, from the seashore. It is a great inland sea, is open to the world and it cannot be edged in so as to cripple the commerce of the world.

"What may be necessary to-day for commerce might be small indeed in comparison to what may be needed in the future. We should always watch carefully that this Commission carry out faithfully the obligations imposed upon it, to maintain inviolate the banks of the great Mississippi River, which drains such an enormous valley.

"It was said at one time that all roads led to Rome, but it seems to me that all interests now are gradually directing their way to New Orleans. We must be equal to the occasion, we must keep open the belt railroad as well as the river front, we must not barter them away but must keep them open for all time for the interests of the whole world."

A. Brittin.

"We stand at the dawn of great changes in the history of commerce. For over a thousand years Venice controlled the commerce of the Old World. It is my belief that New Orleans is the Venice

of the New World. I believe that the time is coming when New Orleans will take the same position before nations of the world that Venice had almost a thousand years ago. To-day we are taking one of the steps which will prepare New Orleans for the position which is rightfully hers among the cities of the world. We are preparing New Orleans for a commerce which only those who are most optimistic have predicted for her and which I believe will come to her in the near future."

"I wish to make a few suggestions. During the next few moments the golden spike will be driven which will show the fact that we are making ready for the coming of the world's commerce. We shall thus tell the world that New Orleans has reached the point where she is ready to receive the business of all the world. We are getting ready to handle the commerce of over 500,000,000 people who are now shut off from us as with a wall of fire. By reason of the geographical position of New Orleans, she will be over 600 miles nearer the great Eastern continent than her sister city New York, and nearly 3,000 miles nearer than Liverpool. No city on the face of the earth will be in a better position to reap the benefits which will accrue from the completion of the Isthmian Canal than will be the Queen City of the South.

"One more word and I am finished. The great President of the United States, at the time that the Louisiana purchase became a part of this country, said that the time was coming when New Orleans would rank commercially and in point of population with any city in this great country. This time is now coming. I say to you this afternoon that the child is now born who will see the fulfillment of the prophecy of the President so many years ago."

500v *Editorial Comment of the Public Press of New Orleans.*

500w The Times Democrat, New Orleans, July 2, 1905.

The fact that July was chosen for a great public ceremony of this kind is in itself significant of the new conditions prevailing; while the large attendance yesterday at the ceremonies on a hot summer day shows the new spirit animating New Orleans and leading it to success. It evinces a public spirit, a civic pride, a confidence in the future of New Orleans characteristic of the prosperous and growing metropolis of the South. Even the Governor of the State came here to take his part in the ceremonies and speech making recognizing the importance of the occasion.

Perhaps no incident could better symbolize and characterize the new life that New Orleans has taken on. When it is considered that for nearly a quarter of a century we have been hammering at this belt proposition, yet accomplishing so very little, the fact that we have at last overcome all the difficulties and have actually got to work will be accepted as the best of omens. During all this time New Orleans languished as a railroad town, and its general business suffered in consequence. It seemed impossible to convince the railroads that New Orleans was a good town for them; and they showed

a disposition to avoid it and build almost anywhere else. How completely the situation has changed is seen to-day in the circumstance that the railroads are now begging for admission, and are building terminals equal to if not finer than those to be found anywhere else in the country. Their confidence in New Orleans, their belief that it is to be one of the great cities of the country has apparently infected everyone.

This has made it all the more necessary that the belt railroad should be built at as early a day as possible. Further delay would seriously handicap our trade, whereas the construction of the belt will permit the interchange of freight between the trunk lines here and the more rapid handling of our local business. The importance of the work has swept away all difficulties and obstructions, and the project which has been in a latent state so long suddenly sprung into life. Progress since then has been rapid. The counter interests and claims which had prevented anything practicable from being done disappeared, and little difficulty was encountered in securing the necessary legislation from the Council. Former opposition disappeared before manifest public sentiment that we must have a public belt. The energy and spirit evoked by the Board of Trade carried through the measure with enthusiasm, and in a few weeks, what would ordinarily have taken years, was accomplished. The financial problem was found under these new conditions far less difficult than had been expected. These were the serious and difficult parts of the programme—to secure a union of all interests, hearty cooperation and action. The physical work of building the belt, establishing its lines and levels was never serious, and it was felt that if we could get over these first obstacles, which had delayed our progress in the matter so many years, it would be easy to complete the work.

Yesterday's driving of the golden spike began the last act of the play—the actual work of construction. It saw a large and enthusiastic audience present to take part in the ceremonies and the speeches of Gov. Blanchard, Mayor Behrman, Messrs. Brittin, Porch, McCloskey and Cunningham all were filled with enthusiasm and expressed the confidence with which New Orleans looks forward to the glorious future assured it.

500. The Daily Picayune, New Orleans, July 2, 1905.

The laying of the first rail of the New Orleans Public Belt Railroad was celebrated yesterday with overflowing oratory and other interesting exercises, and the occasion was considered of sufficient importance to attract the attention of the Governor of Louisiana, who did honor to it, and demonstrated in an eloquent address his appreciation of the importance to New Orleans that must surely result in the completion of the enterprise which was so auspiciously inaugurated yesterday.

The prosperity of New Orleans means prosperity to Louisiana. The commercial and industrial growth and expansion of this city mean a corresponding increase in the business, wealth and general development of the entire State. The greatness of one is a powerful

factor in the grandeur of the other, as the glory of New Orleans is the glory of Louisiana.

The Governor was very felicitous in connecting the New Orleans Port Commission, or Dock Board, and the Orleans Levee Board, both State institutions, with the Belt Railroad Commission, which is a creation of the city. The first named has charged of the marine commerce of the city; the second builds and maintains the levees or embankments which protect the city from the floods of the great river, while the last mentioned is intended to facilitate the transfer of merchandise in railway cars between railroads, between roads and boats and between roads and factories and warehouses.

Said the Governor in this connection: "These three public instrumentalities—the Dock Board, the Levee Board and the Belt Line Commission—working in harmony and controlling the river front from the Jefferson Parish line to a point near the Barracks, mean very much of good for your city."

The Daily States, New Orleans, November 30, 1905.

We are quite sure that the people of New Orleans are gratified to know that all the differences between the Belt Railroad Commission and the railroad companies have been happily settled and the last obstacle to the construction of the city's belting system removed. This consummation was reached at a conference held yesterday between a committee of the Belt Railroad Commission and Mr. Hunter C. Leake, general agent of the Illinois Central Railroad. It was the result of the careful and persistent work done by President Poreh in which he received the zealous cooperation of Mayor Behrman throughout the entire period of the controversy.

The agreement of the Illinois Central Railroad to the arrangement reached at the conference carries with it the endorsement of all the other railroads and the way is now clear to push the work on the Public Belt Line, the need of which has so long been recognized by the commercial interests of the port. In this connection we take pleasure in commending the fairness and disposition manifested by the railroads in settling the controversy by a compromise satisfactory to all parties concerned. At one time the railroads were antagonistic to the Public Belt Line, but they are not now because the business of the city has grown so enormously in the last five years that the need of a belt road to facilitate the prompt handling of traffic is now appreciated and frankly admitted. The position of the railroads has been changed by the logic of the situation, they have withdrawn their opposition to the project and are willing to encourage the city's efforts to increase its terminal facilities, hence all is well that ends well, as this controversy has done.

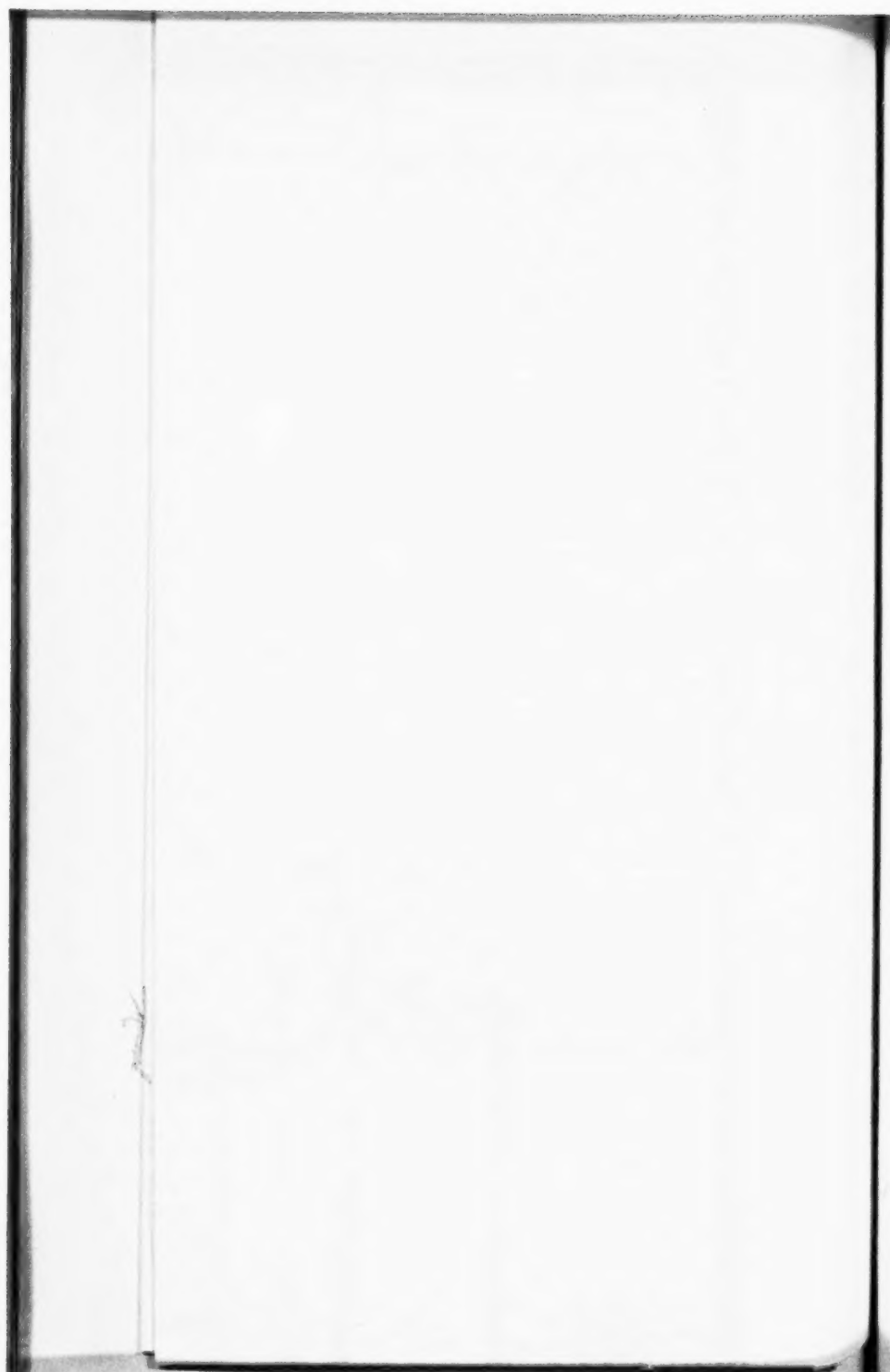
500y

The Milk in the Cocoanut.

Local protection means local development.

Proper appreciation of home interests means development of natural advantages.

MAPS
TOO
LARGE
FOR
FILMING



Unless we protect our own we give our natural advantage to others. Our local safeguards protect us against combinations from the outside.

First interests are home interests which should be protected by local taxpayers.

Without our river front safeguarded we are at the mercy of outside prey.

Transfer of cars from delivering trunk lines to all local enterprises we regard as a necessity.

A commercial center which is also a seaport has to protect itself against the danger of being classed as a stevedoring center.

Our interest as a Belt Line Commission are the public's local interests which should be protected as we would protect any other vital interest.

In the past what we have as a natural advantage has benefited shippers and transportation companies connected with long rail haul, to our detriment; now we simply ask for an equal privilege.

Shore to ship and ship to shore service for the benefit of others is not our intention. We are perfectly willing to put others on an equal basis but as taxpayers and as owners of the facilities we at least reserve the right to be on a parity.

A publicly owned system of wharves in connection with publicly owned levees served by a publicly owned and comprehensive Belt Line which also serves every railroad, every depot, every wharf and every private facility in this great metropolis is a taxpayers' combination which if developed along the lines of our exploitation will prove the most valuable asset ever owned by this city and will be a safeguard to every invested interest within our borders.

Our motto is: A publicly owned Belt Railroad serving publicly owned wharves makes a perfect local condition.

(Here follows map marked page 5002.)

[Endorsed:] No. 79,743. Div. C. Civil Dist. Court. Martin Behrman. Offered to be annexed to a Bill of Exceptions. Filed April 19th, 1909. (Sg.) Joe Garidel, Dep. Cl'k.

501

Submitted.

Extract from the Minutes of Division "C," Monday, April 12th, 1909.

Present the Honorable John St. Paul, Judge.

By consent of all parties, this case having been argued on Friday, April 9th, 1909, was submitted for adjudication the Court — the Matter under advisement.

Submitted.

Extracts from the Minutes of Division "C," Friday, May 21st, 1909.

Present the Honorable E. K. Skinner, Judge.

The argument in this case was resumed on this day, and after hearing Messieurs Robert E. Milling, in behalf of defendant and of Sam'l L. Gilmore in behalf of plaintiff, the case was submitted on briefs to be filed.

Reasons for Judgment.

Filed September 14th, 1909.

Civil District Court, Parish of Orleans, Division "C."

No. 79743.

MARTIN BEHRMAN, Mayor, et al.,
vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

Reasons for Judgment.

The City of New Orleans, through its Mayor, has enjoined the Louisiana Railway & Navigation Company from attempting to use the Public Belt Railroad, which use the defendant claims by virtue of ordinance No. 1997 New Council Series.

502 This litigation arises from the construction by the City of New Orleans of what is known as the Public Belt system, which is now complete and in successful operation under the authority of a body known as the Public Belt Commission, created by Ordinance No. 2683 New Council Series.

The brief of the plaintiffs, herein filed, sets forth in a full and masterly manner the history of the creation of this system. The ordi-

nance- involved are printed in full therein, but only excerpts therefrom are taken to show the application of the law.

After the Constitutional Convention of 1898, the Illinois Central Railroad Company made application to the Council of the City of New Orleans, for the purpose of connecting its main line with its other property, known as the Stuyvesant docks. The City eventually granted this franchise to the Illinois Central Railroad, the consideration of the grant being that the Illinois Central should expropriate, in the name of the City of New Orleans, the property known as Leake Avenue, and build thereon the tracks needed for its own purposes, and likewise build a double track railroad from the Protection Levee in Carrollton to the upper side of Audubon Park, a distance of about two miles, for the uses and purposes of a Public Belt Railroad then under contemplation by the existing authorities.

This consideration was complied with by the Illinois Central Railroad Company, and the City became the absolute owner of the railroad thus constructed.

On August 11th, 1900, the Council of the City of New Orleans adopted Ordinance No. 147 N. C. S., entitled: "An ordinance" establishing a Public Belt Railroad in and for New Orleans," and declared that the management and control of the Public Belt Railroad shall be separate and distinct from that of any other railroad entering the City of New Orleans, and shall remain forever the
503 property of the City of New Orleans, and that no employé, director or officer of any State or Interstate railroad shall be employed by or allowed to act as director, commissioner or manager of the Public Belt Railroad.

This ordinance carried with it the dedication to the public use of the belt railroad of certain property along the river front, and was supplemented by ordinance No. 244 N. C. S. adopted September 14th, 1900, dedicating to the belt railroad certain other property.

On August 12th, 1902, Ordinance No. 147 N. C. S. was approved by the Board of Commissioners of the Port of New Orleans, with this reservation,—"provided, that the approval of the Board of Commissioners of the Port of New Orleans to the dedication of said space "within their jurisdiction for the purpose of a public belt railroad "reservation shall remain in force only so long as the public belt "railroad is operated and controlled by a public commission, in "accordance with the provisions of Ordinance No. 147 N. C. S."

Leaving aside the merits of the controversy leading up thereto, on February 10th, 1903, the Council of the City of New Orleans, adopted Ordinance No. 1615 N. C. S., which granted a franchise and right of way to the New Orleans & San Francisco Railroad Company, authorizing that railroad company to use the tracks belonging by dedication to the Public Belt Railroad and to construct at its own cost and dedicate to perpetual public use the double track now projected from the end of the rails (then existant), on the upper side of Audubon Park to Henderson Street. The railroad thus to be constructed was stipulated to involve an expense of about \$330,000., and was the consideration of this grant.

The Ordinance stipulated that such construction should be com-

pleted before July 1st, 1904. The ordinance contained a great many other provisions, unnecessary to recite, and was vetoed by Mr. Capdevielle, then Mayor of the City, and finally passed over his veto on the date mentioned.

504 Mr. Capdevielle, the Mayor, and Mr. Gilmore, then City Attorney, his Counsel, enjoined the execution of this ordinance upon various grounds, and this suit in the Supreme Court, terminated adversely to their contention on many of the points. 110 La., 903, Capdevielle vs. N. O. & San Francisco R. R. Co.

The Court in that case held:

That ordinance No. 1615, the 'Frisco ordinance,' was a valid exercise of the power of the Council; that it was not violative of the rights acquired by the public, in virtue of ordinance No. 15080 C. S., but the Court also held on the complaint of the City Attorney that "the City has no guarantee that the defendant will ever perform the work. The grant was made on condition that the work would be done before July 1st, 1904. We have no reason to hold that an attempt will be made to fasten an incumbrance on the City, which no authority will be able to shake off."

The ordinance expressly holds to the performance of the whole work, from end to end. The testimony certainly binds defendant to extend its lines, within the time mentioned, to distant places, and to make it part of the system of the railroad repeatedly mentioned in argument and in testimony. It is, as we take it, to be a continuous and interstate road, and a railroad to facilitate relations and to multiply its changes between places. We have found no ground for inferring that the grantees will do less than they held out when then obtained the grant. Our conclusions are based on the ground that this is to be a permanent road, in public interest. The time, in matter of completing the whole work, is an absolute condition. 110 La., 917."

On March 3rd, 1903, the City Council adopted a resolution providing that the delays for the performance by the Frisco of the obligations imposed upon it by ordinance 1615, N. C. S., were made to begin only when the suit of Mayor Capdevielle should be decided.

505 Judgment therein became final on the 26th of June, 1903.

This case will be referred to later as forming the basis of the plea of *res adjudicata*.

The present attorneys for the defendant in this case, appeared in the Supreme Court as *amici curiæ* and propounded certain questions to the Court, but did not succeed in having them answered, or, in any wise modifying the terms of the original judgment.

On September 1st, 1903, within three months after the final decision of the Frisco case the Council adopted Ordinance No. 1997 N. C. S. This ordinance granted to the Louisiana Railway & Navigation Company a franchise to use the tracks already constructed for the belt railroad, as well as that from the upper side of Audubon Park to Henderson Street, which the Frisco, as the consideration of its franchise had stipulated to build.

The consideration of the grant under ordinance 1997, was in the alternative—

1. That when the Louisiana Railway & Navigation Company had exercised its franchise for thirty days, it was obligated to pay to the City for the purpose of constructing the belt railroad tracks the sum of \$50,000.00, this payment to be secured by the deposit of securities and returnable if, for any reason, the grantee shall not be accorded its franchise rights, etc.

2. In the event that the New Orleans & San Francisco Railroad Company, failing, without legal excuse to build the tracks stipulated by it, on or before July 1st, 1904, the Louisiana Railway & Navigation Company was to have the right to build it and enjoy the franchise, and on the terms and considerations of ordinance 1615, authorizing the Frisco to build. In which event it would have the right to exercise its franchise, etc. The ordinance provides that both of these alternative rights shall be secured by the deposit of \$50,000., of securities on July 1st, 1904.

506 In the meantime, May 24th, 1904, the Supreme Court finally determined the case of the Board of Commissioners of the Port of New Orleans vs. New Orleans & San Francisco Railroad Company, the suit having been filed March 9th, 1903.

This was an injunction to restrain the City and the New Orleans & San Francisco Railroad Company from interfering with the exclusive jurisdiction of the Board of Commissioners of the Port, over the harbor, port, wharves and landings of the City of New Orleans.

The Supreme Court held that while the City of New Orleans had no present jurisdiction over the wharves and landings of the port, as such, it might have administrative and inspection powers, and that such jurisdiction does not, however, extend to matters relating merely to the control and administration of the property, and hence does not authorize the interference therewith which is threatened and complained of in this case." 112 La. 1024.

The pleadings in this case, are alleged as the basis of a plea of estoppel and will be referred to later.

After the decision in this case the New Orleans & San Francisco Railroad Company took no further steps to secure its franchise by complying with its obligation to construct the double track from the upper side of Audubon Park to Henderson Street. Ordinance No. 1997, N. C. S., granting a franchise to the Louisiana Railway & Navigation Company had been passed after the decision maintaining ordinance 1615, N. C. S., and while the Port Commission case was pending.

After the decision in the latter case, denying the right of the City and its grantee, the Frisco Railroad, and therefore any one else, to build the additional trackage for a belt line, as stipulated, all issues seemed to be finally settled and all parties in interest apparently acquiesced in the decision.

On October 8th, 1904, about five months after this final judgment in the Port Commission case, the City Council adopted Ordinance No. 2683, N. C. S., extensively amending and modifying Ordinance No. 147, the original Belt Railroad ordinance,

rededicating to exclusive public use the belt system in contemplation and stipulating not to interfere with the rights vested in the Port Commission, excepting in so far as allowed by that body. The last section of the ordinance is as follows: "That all ordinances or parts of ordinances in conflict with the provisions of this ordinance be, "and the same are, hereby repealed."

No objection to this repealing clause was made by the parties in interest, and no deposit by the Louisiana Railway & Navigation Company had been made, on July 1st, 1904, though three months had elapsed.

On January 8th, 1905, ordinance No. 2683, N. C. S., was approved by the Port Commission, with the reservation that the approval should remain in force only as long as the public belt railroad is exclusively operated, managed and controlled by the Public Belt Railroad Commission, and as long as no privileges are granted to any railroad company, to control, manage and operate on said tracks.

On July 17th, 1905, the Board of Commissioners of the Orleans Levee District approved a resolution containing similar reservations.

Both of these Boards so approving, without protest of any kind from the Louisiana Railway & Navigation Company.

On July 1st, 1905, the first spike was driven in the new belt system, under ordinance No. 2683, without protest or objection on the part of the Louisiana Railway & Navigation Company, under either one of the alternative conditions contained in Ordinance No. 1997.

On March 7th, 1906, the City Council adopted ordinance No. 3556, N. C. S., by which \$100,000 was obtained; an extensive construction on the public belt system was undertaken some time before the 16th of May, 1908, and by ordinance No. 4230, N. C. S., an additional sum of \$225,000 was appropriated for construction purposes. On that date the Louisiana Railway & Navigation

508 Company began the construction of a connection between its tracks and the original tracks of the public belt railroad at protection levee. This was prevented by the action of the Mayor, and on June 26th, 1906, the present suit was filed.

The petition alleges that ordinance No. 1997, under which the Louisiana Railway & Navigation Company is claiming the right to operate, is ultra vires, illegal, null and void for the following among other reasons:

1. That said ordinance No. 1997 N. C. S., in so far as it purported to grant to the Louisiana Railway & Navigation Company, the right to construct, maintain and operate its equipment over and along the outer half of the fifty foot neutral ground provided for and dedicated to the people of the City of New Orleans, for perpetual public use, by ordinance No. 15080 C. S., between the upper line of Audubon Park and Henderson Street, and in so far as it purported to grant to said Louisiana Railway & Navigation Company the right for ninety-nine years to operate over the public tracks dedicated to the people of the City of New Orleans for perpetual public use by ordinance No. 15080 C. S., between the upper line of the Parish of Orleans and the upper line of Audubon Park, was and is a law

divesting the people of the City of New Orleans of their property and rights in and to said public tracks, and said outer half of said neutral ground as a public track location, without due process of law, and was and is a law impairing the obligation of the contract made by ordinance No. 15080 C. S., of which the people of the City of New Orleans were the beneficiaries, and is in violation of Articles 2 and 166 of the Constitution of the State and paragraph 1 of Section 10, and article V of the Constitution of the United States.

2. That ordinance 1997 N. C. S., in so far as it purported to grant to the Louisiana Railway & Navigation Company the right of way, and the privilege or privileges to construct, maintain and operate tracks, and the privilege to operate for 99 years with its locomotives and equipment over and along the public tracks constructed
509 under and dedicated by ordinance No. 15080 C. S., along the river front, through Leake Avenue, from the upper line of the Parish of Orleans to the upper line of Audubon Park, and over and along the Public Belt reservation, constructed under and dedicated to the people of the City of New Orleans by ordinance 15080 C. S., through Leake Avenue and connecting Streets, between the upper line of Audubon Park and Henderson Street, were and is, a perpetual grant of rights of way and privileges beyond the legal competency of the Council of the City of New Orleans. The Honorable the Supreme Court of this State so decreed in the case of the Board of Commissioners of the Port of New Orleans vs. New Orleans & San Francisco Railroad Company et als. on or about May 23rd, 1904, 112 La. 1011 et seq., ordinance 1615 N. C. S., in so far as it purports to authorize the New Orleans & San Francisco Railroad Company to construct and operate a right of way on the river front between Toledano and Henderson Streets, through territory over which the Board of Commissioners of the Port of New Orleans had exclusive jurisdiction and administration.

That ordinance No. 1997 N. C. S., has never been approved, ratified or confirmed by the Board of Commissioners of the Port of New Orleans, but, on the contrary, is contrary in letter and spirit to the resolution of the Board of Commissioners of the Port of New Orleans approving, ratifying and confirming ordinance 147 N. C. S., and ordinance 2683 N. C. S. That as ordinance 1997 N. C. S., only purported to grant to the Louisiana Railway & Navigation Company the right to build tracks and to operate trains, cars and traffic over said tracks on the river front, from the upper side of Audubon Park to Henderson Street, in the event the New Orleans & San Francisco Railroad Company, its successors and assigns, failing without legal excuse to build said tracks, and, under the decree of the Supreme Court herein referred to, the grant to the New Orleans & San Francisco Railroad Company to build tracks from the upper side of Audubon Park to Henderson Street was declared ultra vires, null and void, no grant
of any right of way or privilege to construct, maintain or
510 operate tracks, or to operate trains, cars and traffic over the tracks, between the upper side of Audubon Park and Henderson Street were ever granted to the said Louisiana Railway & Navigation Company.

That said grant to the New Orleans & San Francisco Railroad Company, and contingently to the Louisiana Railway & Navigation Company, in the event the New Orleans & San Francisco Railroad Company failed without legal excuse to build said tracks, was a grant indivisible in character, which conferred no right or privilege upon either company to build less than the entire length of the tracks, or to construct, maintain and operate tracks over parts or portions of said river front anywhere between the upper line of Audubon Park and Henderson Street.

That ordinance No. 1997 N. C. S., only bound and required the Louisiana Railway & Navigation Company, in the event of the failure of the New Orleans & San Francisco R. R. Company, without legal excuse to build tracks from the upper side of Audubon Park to Henderson Street to complete said tracks to Henderson Street within one year from the time the City should furnish the clear and undisputed right of way, and provided further that in case the said Louisiana Railway & Navigation Company should be prevented from building said tracks or any portion of the same, on account of the City not providing the right of way under the terms of ordinance 1615 N. C. S., or by causes beyond its control, the bonds to the value of \$50,000, deposited by said Company with the fiscal agent as security for compliance by said Company with its purported obligations, should be returned to it.

That the City council was and is, as established by the decision of the Supreme Court, in the case of the Board of Commissioners of the Port of New Orleans, without power or authority to furnish the right of way purported to be granted by ordinance 1615 N. C. S., and was and is prevented, by causes beyond its control from granting rights of way or privileges to construct, maintain and operate railroad tracks or a railroad system along the neutral ground of Leake Avenue and connecting streets, from Audubon Park to Henderson Street, and was and is without power or authority to grant a right or use for ninety nine years or for any other term for the operation by said Louisiana Railway & Navigation Company, with its locomotives, cars and equipment over the Public Belt R. R. constructed under ordinance No. 15080 C. S. between the upper line of the Parish of Orleans and the upper line of Audubon Park.

3. That ordinance No. 1997 N. C. S. only purported to grant to the Louisiana Railway & Navigation Company the right, in the event the New Orleans & San Francisco Railroad Company, should from any cause, complete only a portion of the tracks from the upper side of Audubon Park to Henderson Street, to operate its own locomotives cars and equipment over the Public Belt tracks between the upper line of the Parish of Orleans and the upper line of Audubon Park, and over such tracks as might be built by the New Orleans & San Francisco R. R. Co., between the upper line of Audubon Park and Henderson Street. That the New Orleans & San Francisco Railroad Company has never built any tracks between the upper line of Audubon Park and Henderson Street, and the right purported to be granted by Ordinance 1997 N. C. S., to the Louisiana Railway & Navigation Company to operate its own loco-

motives, cars and equipment over the public belt tracks was based on the condition that the New Orleans & San Francisco Railroad Company should complete a portion of the tracks from the upper side of Audubon Park to Henderson Street. That moreover ordinance 1997 N. C. S., insofar as it purported to grant to the Louisiana Railway & Navigation Co., the right to operate its own locomotives, cars and equipment, over the public belt tracks, between the upper line of the Parish of Orleans and the upper line of Audubon Park, was a law directing the vested property right acquired under and impairing the obligations of the contract made by ordinance 15080 C. S.

512 4. That by the terms of ordinance 1997 N. C. S., the Louisiana Railway & Navigation Company was unconditionally required, in order to become entitled to the right purported to be granted to it, to construct and maintain tracks from the upper side of Audubon Park to Henderson Street, in the event that the New Orleans and San Francisco Railroad Company should fail without legal excuse to build said tracks or to operate its locomotives, cars and equipment over the public belt tracks between the upper line of the Parish of Orleans and the upper line of Audubon Park to deposit on or before July 1st, 1904, with the fiscal agent of the City of New Orleans, bonds or other securities satisfactory to the fiscal agent, of the value of \$50,000, the same to be held in escrow as security for compliance by said Company with its aforesaid contingent obligation, and that no deposit of bonds or other securities to the value of \$50,000., or of any value were deposited by the said Company with the fiscal agent of the City of New Orleans on or before July 1st, 1904, as security, in accordance with the terms of ordinance 1997 N. C. S.

Under the prayer of this petition injunction issued in due course and was properly served. No proceedings were had to dissolve the injunction, and nothing done by either party to the suit until the 22nd of September, 1906, when a petition was filed herein praying for a judicial sequestration of the public belt reservation from the upper line of Audubon Park to Henderson Street and that the sequestration continues until this case was decided. The application was denied and no appeal taken therefrom. A prayer foroyer was also filed and dismissed December 6th, without further action by defendant.

By ordinance No. 3556 N. C. S., March 7th, 1906, the City of New Orleans obtained the sum of \$100,000., before the issuance of the injunction herein, and the City proceeded with the construction of the public belt without opposition on the part of the defendant and in violation of its alleged rights. By ordinance 4230

513 N. C. S., adopted December 6th, 1906 the City obtained the further sum of \$225,000. to further proceed with the construction of the public belt provided for by ordinance 147 N. C. S., as amended by ordinance 2583 N. C. S., the new belt system.

No further proceedings were had in the controversy, but in the meantime the public belt commission proceeded with the construc-

tion of its road and finally completed it without opposition and thus an entirely new condition of affairs was created, which the pleadings show the defendant desired to avail itself of. During this time the defendant attempted in sundry interviews with the Mayor and the City Attorney to adjust the matter by compromise. These attempts at a compromise are shown in the record; but that evidence cannot be given effect for the reason that negotiations leading to a compromise, which must be in writing, cannot be considered except to show the attempt alone. October 18th, 1908, the exception and answer of the defendant were filed and the following pleadings:

1st. The plea of *res adjudicata* based upon the decision in the case of *Capdevielle vs. New Orleans & San Francisco R. R. Co.*, 110 La., p. 904;

2nd. The plea of *estoppel* based upon the decision in the case of the Board of Commissioners of the Port of New Orleans, 112 La. p. 1011;

The answer claims that the Louisiana Railway & Navigation Company, under ordinance 1997 N. C. S., had the right on the default of the New Orleans & San Francisco R. R. Co., to construct the track in question, or any part thereof, and to use, after construction such portion thereof as it had constructed as well as that already built from the upper side of Audubon Park to the protection levee, under the obligation of paying a sum proportionate to the amount required for the entire construction.

514 That the ordinance 1997, was accepted by notarial act and became valid and binding contract between defendant and the City of New Orleans, and that defendant would have complied therewith if injunction had not issued.

That it was contemplated in ordinance 1615 N. C. S. and ordinance 1997 N. C. S., that either of the parties had the right to construct a portion of the tracks and that their respective rights would then accrue.

That the resolution of the Board of Commissioners of the Port of New Orleans authorizing the Belt railroad to construct the line contemplated in ordinance 147 N. C. S., was sufficient authority for the Louisiana Railway & Navigation Company to construct the line, and that in the event the council did not have the power to grant the franchise over property within the jurisdiction of the Board of Commissioners of the Port of New Orleans it did have the right to make the grant over the tracks from the upper line of Audubon Park to the protection levee and from the end of the tracks already constructed to Toledano Street. And that the grant to this extent was effective and binding on the City. The ordinance 2683 N. C. S. amending ordinance 147 N. C. S., and repealing ordinance 1997 N. C. S., was an unconstitutional ordinance in that it attempted to divest the Louisiana Ry. & Navigation Co. of its vested rights under ordinance 1997. That the Louisiana Railway & Navigation Company has not violated any of the obligations imposed upon it by these various ordinances. That the deposit of the \$50,000. was made within the legal delay. That a resolution was adopted by the

Council extending the time allowed the New Orleans & San Francisco R. R. Co., to build its tracks from the upper side of Audubon Park to Henderson Street, and that the time limit for the Louisiana Railway & Navigation Company to make the deposit only began to run when the right of the New Orleans & San Francisco R. R. expired; and that the deposit was properly and legally made and the rights of defendant thereby protected. That the defendant being prohibited by injunction from proceeding with its contract then the work done by the belt Railroad was done by it as the agents of defendant, and that defendant's rights accrued thereby.

The plea of *res adjudicata* is not well taken. In the case of *Capdevielle vs. The New Orleans & San Francisco R. R. Co.*, 110 La. p. 904, the Mayor contested the validity of ordinance 1615 on the ground that the grant was *ultra vires*, that it was unconstitutional as divesting the vested rights of the public belt road under ordinance 147 N. C. S., and ordinance 15080 C. S. The Court held the ordinance not *ultra vires* and not unconstitutional; in the case of the Board of Commissioners of the Port of New Orleans, 112 La., p. 1011 the Court modified its opinion to the extent of holding the ordinance *ultra vires*, in so far as it authorized the construction on property exclusively within the jurisdiction of the Port Commission.

To be *res adjudicata* the thing demanded must be the same, founded on the same cause of action, between the same parties and formed by them against each other in the same quality. C. C. Article 2286.

There was no issue joined in that case between the Mayor and the Louisiana Railway & Navigation Company. The counsel for defendant appeared as *amici curiæ* and representing the predecessor of the present defendant, propounding certain questions which remained unanswered.

The plea of estoppel is likewise over-ruled.

The City contested the validity of ordinance 1615 N. C. S., and was overruled, in the above case, and in the case of the Board of Commissioners of the Port of New Orleans the City through special counsel, not through the City Attorney, who had recused himself, attempted to maintain the validity of ordinance 1615 N. C. S., as set forth in the opinion of the Court in the *Capdevielle* case; but the

Court held the ordinance invalid in so far as the rights of the Port Commission were concerned.

These two decisions held, in effect, that the Council has the power to grant such franchises as were contemplated by ordinance 1615 and ordinance 1997 N. C. S., provided the grant did not impinge on the rights of the Board of Commissioners of the Port of New Orleans.

An erroneous claim in law cannot form the basis of a plea of estoppel, and the plea of the special counsel for the City was simply an illegal deduction from the reasons in the *Capdevielle* case, 38 An., 102; 47 An., 851.

On the Merits.

Counsel for the City herein has in paragraph 4 of his petition again attacked the constitutionality of both ordinance 1615 and ordinance 1997, N. C. S., on the ground that they purport to divest the public belt system of its vested right by granting the right of use of the old tracks built by the Illinois Central Railroad to the defendant; and further divests its vested rights by the creation of a system of arbitration in the management of the property. There is besides a quantity of evidence tending to show that the grant, if maintained, would be entirely subversive of the Public Belt System and completely destroy that great and growing public utility.

It is not within the province of this Court to pass on the question of the constitutionality of either of these ordinances. The matter has already been determined by the Supreme Court, and it is jurisprudence which this Court must follow. The evil result to follow from the maintenance of the present ordinance cannot be considered by the Court. Its wisdom vel non, might have appealed to the legislative and contract making body; but the Court cannot investigate that question if the contract has become a valid and binding obligation, except, may be, to show the disturbance of the vested rights of the parties.

517 The grant to the New Orleans & San Francisco R. R. Co., was made with the motive as set forth in the ordinance of having a belt railroad constructed to Henderson St., from the terminus of its old rails. The motive of the New Orleans & San Francisco Railroad was to obtain the franchise specified, and the consideration of the grant was the construction by the grantee of the stipulated trackage in its entirety. There is no intimation that the franchise in whole or in part would be granted without the entire consideration. The contract was for an indivisible grant, for an indivisible consideration.

The New Orleans & San Francisco R. R. Co., abandoned its ordinance, 1615 N. C. S., after the decision in the Port Commission case, never constructed or attempted to construct the stipulated trackage from the upper side of, Audubon Park to Henderson Street.

It did this because its obligation was rendered impossible of execution by the decision in the Port Commission case, and which formed a legal excuse for the abandonment. This was a conditional and suspensive obligation. Article 2021 C. C. provides: "Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happened it is a suspensive condition." And if the suspensive condition does not happen within the time limited in the contract, then the contract falls of its own weight.

The view of the law is discussed in the matter of New Orleans Vs. Texas & Pacific Railroad Company, 171 U. S., p. 331 et seq. The Court holds that "An ordinance of the City Council of New Orleans giving the right to extend railroad tracks from a depot at a designated terminus in said City to certain points, in consideration of the obligation to establish its terminus at the place desig-

* nated, creates a suspensive condition or condition precedent.

518 The grants in question having been made to the Texas Pacific R. R. or its assignors, under a suspensive condition which has not been complied with in the time limited, the ordinances were repealed by the City Counsel and all the grants forfeited by the grantee.

It is well to note that this repealing ordinance was sanctioned by the Court and was adopted under circumstances similar to those prevailing between the parties hereto at the time of the adoption of ordinance 2683 N. C. S., one of the effects of which was to repeal ordinance 1615 and ordinance 1997 N. C. S.

The grant to the Louisiana Railway & Navigation Company was made under two alternative conditions. First, that the Louisiana Railway & Navigation Company should exercise its franchise over the tracks already constructed and to be constructed by the New Orleans & San Francisco R. R., but the New Orleans & San Francisco constructed no tracks, as stipulated, and hence forfeited its contract, and the suspensive condition having failed this alternative right of the Louisiana Railway & Navigation Company likewise fell with it.

Second, the other alternative condition was that the Louisiana Railway & Navigation Company should have the right to build the tracks from the upper side of Audubon Park to Henderson Street "in the event of the New Orleans & San Francisco R. R. its successors or assigns, failing without legal excuse, to build said belt tracks * * * on or before July 1st, 1904." In this contingency the motives of the parties remained the same and the consideration was the same.

The City contends, and we think correctly, that this stipulation is also a suspensive condition: that the New Orleans & San Francisco failed to build with legal excuse and that the alternative-suspensive condition never having happened the right dependent thereon did not accrue.

519 The phrase "without legal excuse" seems to be the gist of the contention. It is fair to say that it means that the right of the Louisiana Railway & Navigation Company to construct would only arise should the New Orleans & San Francisco fail "wilfully and negligently" to build the track in question and not if it had "legal excuse" not to build said tracks. It certainly implies that if the New Orleans & San Francisco had a legal excuse not to build, then no one else should have the right. The City did not undertake to grant one any more rights than the other.

At the time of the passage of the ordinance No. 1997 N. C. S., the decision in the Capdevielle case had been rendered, maintaining the validity of ordinance 1615, and the decision in the case of the Board of Commissioners Vs. N. O. et al., modifying that ruling had not been rendered. Therefore when the ordinance 1997 was adopted there was no indication that the New Orleans & San Francisco would fail to build the tracks stipulated except wilfully and negligently and the grant to the Louisiana Railway & Navigation Company was

made to cover such a contingency, but was worded in different language, but meaning the same.

But conceding this construction of the words of the contract to be erroneous, that it did not intend the words "without legal excuse" to mean that this second alternative suspensive condition should not arise, if the New Orleans & San Francisco failed to build the belt tracks "with legal excuse" the question would arise whether the Louisiana Railway & Navigation Company, had complied within the proper delay, with its obligation to make a deposit, guaranteeing its compliance with its contract.

Ordinance 1997 N. C. S. confers on the Louisiana Railway & Navigation Company, if any exists, the right to construct the belt tracks, and provides (paragraph c) "that said Louisiana Railway & Navigation Company shall on July 1st, 1904, deposit with the fiscal agent of the City of New Orleans bonds or other securities satisfactory to said fiscal agent of the value of \$50,000., the same to be held in escrow as security for compliance by said company with the foregoing obligation, and to be returned to said company when said company shall have built and completed said belt tracks from the upper side of Audubon Park to Henderson Street.

This deposit was not made on the date provided for in the ordinance, but was made on the 10th of November, 1905, one year and four months after the specified time in the ordinance.

The delay is claimed to have been justified by the litigation in which ordinance 1615 was involved, and by the further fact that the right of the New Orleans & San Francisco to build the tracks had not expired because of the litigation and because of a resolution of the Counsel extending the time for the completion of the tracks by the New Orleans & San Francisco, and which injured to the benefit of this defendant.

No such resolution, even if legal, has been offered in evidence, but on the contrary on October 8th, 1904, ordinance 2683 N. C. S., was adopted, amending ordinance 147 N. C. S., and repealing both ordinance 1615 and 1997 N. C. S., and all ordinances in conflict with it including granting delays. This repealing ordinance was unquestionably valid because none of the suspensive conditions contained in them had been complied with in the time limit fixed in the ordinances.

The defendant contends that it accepted ordinance 1997 by notarial act. That is true, but the act had only the effect to put the proof of acceptance in authentic form, and did not and could not modify the terms and conditions of the contract as agreed upon.

The motive which inspired the adoption of the ordinance was to procure the building of a belt railroad as described. It was indivisible between the termini, the obligation was likewise indivisible, and the franchise was indivisible. And ordinance 1997 (paragraph c) provides "further, that, in case said Company shall be prevented from building said belt tracks or any portion of the same, on account of the City not furnishing the right of way under the terms of ordinance 1615 N. C. S., or by causes beyond its

control, then the securities deposited shall be returned to it by said fiscal agent. This indicates that the contract was considered indivisible, and not that a portion of the franchise was granted if a portion of the track was built; it simply provides for the return of the deposit.

The resolution of the Board of Commissioners of the Port of New Orleans authorizing the Belt Railroad to construct the line contemplated in ordinance 147 was not authority for the Louisiana Railway & Navigation Company to construct the line. The ordinance speaks specifically to the contrary and expressly provides that the belt railroad shall only, be authorized to build said tracks in the event no other railroad shall have any right in the management or the use of the road to be constructed.

The Court concludes that this grant to the N. O. & San Francisco R. R. Co. was a contract with a suspensive condition, and that the event did not happen within the time fixed. That the grant to the La. Railway & Navigation Co. was a similar condition which likewise failed, and that the ordinance 2683, repealing the grants in both instances, was the exercise of the legal right of the City and did not impair the obligations of the contract, and, hence, that the rights of the Louisiana Railway & Navigation Company have elapsed and the injunction properly issued.

Judgment will be rendered in due course, perpetuating the injunction.

N. O. Sep. 14/09.

(Signed)

E. K. SKINNER, Judge.

522

Judgment Perpetuating Injunction.

Rendered October 15th, 1909.

Judgment.

Civil District Court, Division "C."

No. 79743.

MARTIN BEHRMAN, Mayor of the City of New Orleans,

vs.

LOUISIANA RAILWAY AND NAVIGATION Co.

In this matter submitted for adjudication, the law and the evidence being in favor of plaintiff, for the reasons assigned in the written opinion of the Court filed on the 4th day of September, 1909.

It is ordered, adjudged and decreed that there be judgment in favor of plaintiff, Martin Behrman, in his official capacity of Mayor of the City of New Orleans, and as ex officio President of the Public Belt Rail Road Commission of the City of New Orleans, and against defendant, The Louisiana Railway & Navigation Company, its les-

sors, transferees, successors and assigns, declaring Ordinance 1997, New Council Series, in so far as it purports to grant to said Louisiana Railway and Navigation Company, any rights of way, or privileges to construct, maintain and operate railroad tracks on the outer half of the neutral ground, or public belt reservation, through Leake Avenue and connecting Streets, from the upper line of Audubon Park to Henderson Street, or to operate locomotives, cars or other equipments over the public belt tracks, between the upper line of the Parish of Orleans and the upper line of Audubon Park, or over the outer half of the neutral ground or public belt reservation, through Leake Avenue, from the upper line of Audubon Park to Henderson Street to be illegal, void and of no effect and perpetuating the preliminary injunction herein issued; costs to be paid by defendant.

Judgment rendered in open Court October 15th, 1909.

Judgment read and signed in open Court October 22nd, 1909.

(Signed)

E. K. SKINNER, *Judge*.

523

Motion of Appeal.

Filed October 25th, 1909.

Civil District Court, Parish of Orleans, Division "C."

No. 79743.

MARTIN BEHRMAN, Mayor,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

On motion of the Louisiana Railway & Navigation Company, through its attorneys, Foster, Milling & Godchaux and Alexis Brian, and on suggesting to the Court that there is error to the prejudice of defendant in the judgment rendered herein on the 15th day of October, and signed on the 22d day of October, 1909;

It is ordered by the Court that the defendant be and is hereby allowed an appeal suspensive and devolutive from said judgment, returnable to the Supreme Court, of the State of Louisiana, Twenty one days from the date hereof and that the amount of the bond for the suspensive appeal be fixed at Two Hundred & fifty Dollars, and for the devolutive appeal at Two hundred & fifty Dollars.

New Orleans, La. Oct. 25th, 1909.

(Signed)

E. K. SKINNER, *Judge*.

Appeal Bond (Suspensive).

Filed November 2nd, 1909.

Civil District Court, Parish of Orleans, Division "C."

No. 79743.

MARTIN BEHRMAN, Mayor,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

Know all men by these presents, That we, the Louisiana Railway & Navigation Company, as principal and Emile Godchaux as surety, are bound unto the Clerk of the Civil District Court for the Parish of Orleans, his successors and assigns, in the sum of Two Hundred & Fifty Dollars, for the payment whereof we bind ourselves, our heirs, executors successors and administrators by these presents.

Scaled with our seal- and signed and dated in the City of New Orleans, on this the 26th day of October 1909.

Whereas the above bounden Louisiana Railway & Navigation Company has this day filed a motion of appeal suspensive and devolutive from the final judgment rendered in the suit of Martin Behrman, Mayor against the La. Railway & Nav. Co., No. 79,743, of the docket of the Civil District Court for the Parish of Orleans, and signed on the 22d day of Oct. 1909.

Now the condition of the above obligation is such that the above bound Louisiana Railway & Navigation Co. shall prosecute said suspensive appeal and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if it be cast in the appeal, otherwise the said Emile Godchaux shall be liable in its place.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

(Signed)

By EMILE GODCHAUX, Attorney.
EMILE GODCHAUX.

525

Appeal Bond (Devolutive).

Filed November 2nd, 1909.

Civil District Court, Parish of Orleans, Division "C."

No. 79743.

MARTIN BEHRMAN, Mayor,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

Know all men by these presents, that we, the Louisiana Railway & Navigation Company as principal and Emile Godchaux as surety, are bound unto the Clerk of the Civil District Court for the Parish of Orleans, his successors and assigns in the sum of Two Hundred & Fifty Dollars, for the payment of which we bind ourselves, our heirs, executors, successors and administrators by these presents.

Sealed with our seal and signed and dated in the City of New Orleans, on this 26th day of Oct. 1909.

Whereas the above bounden Louisiana Railway & Navigation Company has this day filed a motion of appeal suspensive and devolutive from the final judgment rendered in the suit of Martin Behrman, Mayor vs. Louisiana Railway & Navigation Co., No. 79,743, of the Docket of the Civil District Court for the Parish of Orleans, and signed on the 22d day of October 1909.

Now, the condition of the above obligation is such that the above bound La. Railway & Navigation Co. shall prosecute said devolutive appeal and shall satisfy whatever judgment may be rendered against it, or that the same shall be satisfied by the proceeds of the sale of its estate, real or personal, if it be cast in the appeal, otherwise that the said Emile Godchaux shall be liable in its place.

LOUISIANA RAILWAY & NAVIGATION COMPANY,

(Signed) By EMILE GODCHAUX, *Its Attorney*.
EMILE GODCHAUX.

526

Certificate.

STATE OF LOUISIANA,

Civil District Court for the Parish of Orleans:

I, L. W. Gunther, D'y Clerk of the Civil District Court for the Parish of Orleans, do hereby certify that the foregoing Five hundred and twenty-five (525) pages do contain a true, correct and complete transcript of all the proceedings had, documents filed and evidence adduced upon the trial of the cause wherein Martin Behrman, Mayor is plaintiff and Louisiana Railway & Navigation Co., is defendant, instituted in this Court and now in the records thereof

under the No. 79,743 of the Docket thereof, Division "C," the Honorable E. K. Skinner, Judge.

In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said Court, at the City of New Orleans, on this 22nd day of November, in the year of our Lord, one thousand nine hundred and nine, and in the one hundred and thirty-fourth year of the Independence of the United States of America.

(Signed)

L. W. GUNTHER,

D'y Clerk. [SEAL.]

527 Proceedings Had in the Supreme Court of the State of Louisiana.

Filing Motion and Affidavit for Time.

Supreme Court, State of Louisiana.

No. 17971.

MARTIN BEHRMAN, Mayor,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

On motion of Foster, Milling & Godchaux, and Alexis Brian, of counsel for Louisiana Railway & Navigation Company, defendant and appellant in the above entitled and numbered cause, and on suggesting to the Court that owing to the large size of the transcript in this case, the Clerk of the Civil District Court for the Parish of Orleans, has been unable to make or prepare same within the time prescribed, although he has exercised due diligence and has made every effort to do so; and considering the affidavit annexed to this motion,

It is ordered by the Court that the time allowed mover for filing the transcript of appeal in this case be extended and that mover be allowed until the 22nd day of November, in the year 1909, to file the said transcript in this Court, and that the return day be extended to that date.

STATE OF LOUISIANA,

Civil District Court for the Parish of Orleans:

No. 79743.

MARTIN BEHRMAN, Mayor of the City of New Orleans,

vs.

LOUISIANA RAILWAY & NAVIGATION Co.

528 L. W. Gunther, Deputy Clerk of the Civil District Court for the Parish of Orleans, being duly sworn, deposes and says that the transcript of appeal in the above entitled and numbered

cause, returnable to the Supreme Court of the State of Louisiana on the 15th day of November, 1909, has not been completed, for the reason that there has not been sufficient time in which to complete the same, and that an additional delay until the 22nd day of November, 1909, from this date is necessary to enable him to complete the same.

(Signed)

L. W. GUNTHER.

Deputy Clerk.

Sworn to and subscribed before me this 15th day of November, A. D. 1909.

[SEAL.]

(Signed)

T. CONNELL,

*Clerk of the Civil District Court
for the Parish of Orleans.*

(Endorsed:) No. 17,971—Supreme Court, State of Louisiana—Martin Behrman, Mayor vs. Louisiana Railway & Navigation Company—Motion—Entered and filed Nov. 15, 1909. (Signed) Paul E. Mortimer, Clerk.

Entering Order.

Extract from Minutes.

NEW ORLEANS, MONDAY, *November 15th*, 1909.

The Court was duly opened, pursuant to adjournment. Present—Their Honors:—Joseph A. Breaux, Chief Justice; And Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty and Alfred D. Land, Associate Justices.

No. 17971.

MARTIN BEHRMAN, Mayor,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

529 On motion of Foster, Milling & Godchaux and Alexis Brian, of counsel for Louisiana Railway & Navigation Company, defendant and appellant in the above entitled and numbered cause, and on suggesting to the Court that owing to the large size of the transcript in this case, the clerk of the Civil District Court for the Parish of Orleans, has been unable to make or prepare same within the time prescribed, although he has exercised due diligence and has made every effort to do so; and considering the affidavit annexed to this motion; It is ordered by the Court that the time allowed mover for filing the transcript of appeal in this case be extended and that mover be allowed until the 22nd day of November, in the year 1909, to file the said transcript in this Court, and that the return day be extended to that date.

Transcript of Appeal Filed.

Supreme Court of Louisiana.

No. 17971.

MARTIN BEHRMAN, Mayor,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

Filed November 22, 1909. (Signed) Paul E. Mortimer, Clerk.

Filing Motion and Order to Advance.

Supreme Court of Louisiana.

No. 17971.

MARTIN BEHRMAN, Mayor,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

On motion of Foster, Milling & Brian, of counsel for defendant in the above entitled and numbered suit, and on suggesting to the Court that the issues involved in this suit will determine the question

as to whether or not defendant is entitled to a right of way
530 over the Belt Reservation of the City of New Orleans, and

the legality of an injunction issued to restrain your defendant from exercising its rights over said Belt Reservation, and on suggesting to the Court that these issues involved make this case a preference case before your Honorable Supreme Court, and should therefore be placed upon the summary docket and tried in preference to any other case, except State cases, as provided by law;

It is ordered by the Court that the above styled and numbered cause be placed upon the summary docket and that same be set down for hearing before this Honorable Court, on the 31 day of January 1910, and that all counsel appearing in this case be notified by the Clerk of this Court.

(Endorsed:) No. 17,971—Supreme Court of Louisiana—Martin Behrman, Mayor, vs. Louisiana Railway & Navigation Company—Motion—Entered and filed Dec. 4, 1909, (Signed) Paul E. Mortimer, Clerk.

Entering Order.

Extract from Minutes.

NEW ORLEANS, SATURDAY, December 4th, 1909.

The Court was duly opened, pursuant to adjournment. Present—
Their Honors:—Joseph A. Breaux, Chief Justice; And Francis T.

Nicholls, Frank A. Monroe, Olivier O. Provosty and Alfred D. Land,
Associate Justices.

No. 17971.

MARTIN BEHRMAN, Mayor,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

On motion of Foster, Milling & Brian, of counsel for defendant in the above entitled and numbered suit, and on suggesting
531 to the Court that the issues involved in this suit will determine the question as to whether or not defendant is entitled to a right of way over the Belt Reservation of the City of New Orleans, and the legality of an injunction issued to restrain your defendant from exercising its rights over said Belt Reservation, and on suggesting to the Court that these issues involved make this case a preference case before your Honorable Supreme Court, and should therefore be placed upon the summary docket and tried in preference to any other case, except State cases, as provided by law; it is ordered by the Court that the above styled and numbered cause be placed upon the summary docket and that same be set down for hearing before this Honorable Court, on the 31st day of January, 1910, and that all counsel appearing in this case be notified by the Clerk of this Court.

Case Called, Argued and Submitted.

Extract from Minutes.

NEW ORLEANS, MONDAY, *January 31st*, 1910.

The Court was duly opened, pursuant to adjournment. Present—

Their Honors:—Joseph A. Breaux, Chief Justice; And Francis T. Nicholls, Frank A. Monroe, Olivier O. Provosty and Alfred D. Land, Associate Justices.

No. 17971.

MARTIN BEHRMAN, Mayor of the City of New Orleans,

vs.

LOUISIANA RAILWAY & NAVIGATION CO.

This cause came on this day to be heard and was argued by counsel:—Mr. Samuel L. Gilmore opened for the plaintiff, appellee; and was followed by Mr. R. E. Milling, counsel for the defendant, appellant, who closed the argument. The Court then took
532 the cause under advisement upon the briefs and papers now on file.

Final Judgment.

Extract from Minutes.

NEW ORLEANS, MONDAY, November 14, 1910.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors, Joseph A. Breaux, Chief Justice; And Frank A. Monroe, Olivier O. Provosty and Alfred D. Land, Associate Justices.—Absent:—Francis T. Nicholls, Associate Justice.

His Honor, Mr. Justice Provosty pronounced the opinion and judgment of the Court in the following case:—

No. 17971.

MARTIN BEHRMAN, Mayor of the City of New Orleans,
vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

Judgment Affirmed.

His Honor, the Chief Justice dissents and reserves the right to hand down reasons.

533

*Opinion of the Court.*UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

NEW ORLEANS, MONDAY, November 14, 1910.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors, Joseph A. Breaux, Chief Justice; Frank A. Monroe, Olivier O. Provosty, Alfred D. Land, Associate Justices.
Absent: Francis T. Nicholls, Associate Justice.

His Honor, Mr. Justice Provosty, pronounced the opinion and judgment of the Court in the following Case:

MONDAY, *November 14th.*, 1910.

No. 17971.

Mr. Justice Provosty.

MARTIN BEHRMAN, Mayor of the City of New Orleans,
 vs.
 LOUISIANA RAILWAY AND NAVIGATION COMPANY.

Appeal from the Civil District Court, Parish of Orleans, Division
 "C."

The authorities of the City of New Orleans conceived the plan of a public belt railroad system that should pass along the river front and encircle the city, connecting all the trunk lines of railroad, and reaching by means of switches every wharf, freight depot and important industry. Unfortunately the city had not the funds wherewith to carry out the project. A beginning was made, however, by entering into a contract with the Illinois Central Railroad under which, in consideration of certain concessions, that railroad constructed two miles of the part of the line along the river front, namely: from the upper limit of the city down to the upper boundary of Audubon Park. The city then passed an ordinance creating a Board of Commissioners to have charge and control of the proposed belt railroad. The ordinance bears date August 7, 1900.

About two years later, there was passed an ordinance known as the Frisco Ordinance or Ordinance 1615, N. C. S. This ordinance embodied a scheme for the continuation of the construction of the projected belt railroad of which the Illinois Central had already constructed two miles. The scheme was that the St. Louis and San Francisco Railroad,—or the Frisco, as popularly called,—should construct, at its own expense, five miles of the road, continuing down to Henderson street the two miles already constructed by the
 535 Illinois Central Railroad, in consideration of which — should have the use of the belt, with the right to operate thereon, its own locomotives, cars and equipment; that an account should be kept of this expense and that every railroad, on contributing an amount at least equal, should have the right to use the belt in the same way. The ordinance made careful provision for the mode of operating the belt, both while in course of construction and when completed. The full text of the part having reference to the belt railroad is given in the margin.

* * * * *

Margin.

10th. Over the double track belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson street, upon the following terms and conditions:

(a) That said Company shall, at its own cost and expense construct and dedicate to perpetual public use, the double track, as now projected from the end of the rails on the upper side of Audubon Park to Henderson street, with all necessary and convenient cross overs, switches, and spur tracks, such construction to be completed before July 1st, 1904, under the direction of the public belt authorities of the City of New Orleans. Said Company shall keep an accurate account of said cost of construction as herein provided and shall present said account with proper vouchers to the said public belt authorities, who shall audit the same for the purpose of determining the aggregate amount expended under this clause, of this paragraph, of this ordinance.

(b) That the City shall furnish a clear legal right of way for the construction of said tracks, but said Company shall pay the cost and expense of removing any tracks or structures that may physically obstruct said legal right of way, and any expropriation expenses not to exceed twenty thousand dollars (\$20,000.00).

536 (c) That the legal title to the whole of said belt tracks, switches, spurs, sidings, etc., constructed and to be constructed, shall be in the City of New Orleans, and the City shall, be the sole owner of all of said tracks and their appurtenances, at all times, and under all circumstances.

(d) That said tracks shall, upon the completion of the city's belt system to Clouet street, be under the sole and exclusive control and management of the public belt authorities of the City of New Orleans.

In order to provide for the completion of said belt system to Clouet street and its further continuation or construction, said public belt authorities shall have the right and power to grant the right of use of said tracks to any railroad now in, or that may hereafter come into the City of New Orleans, exacting as a condition of said grant from each of said railroads, to which said right of use is granted, a sum equal to the amount expended as aforesaid by the New Orleans and San Francisco Railroad Company for construction of said belt tracks to Henderson street. All sums so paid to said public belt authorities in consideration of such grants, shall be deposited with the fiscal agent of the City of New Orleans, to the credit of a special fund and said fund shall not be used for any other purpose than the construction of the belt tracks, switches, side tracks, spurs and turn outs, as part of the public belt system of the City of New Orleans, and the payment of the costs of right of way for such belt system. The New Orleans and San Francisco Railroad Company and every other company which shall contribute as aforesaid to the completion of the belt system shall have the right to use said completed belt, said use being always under the management and control of the "Public Belt Authority," and for such use each company shall pay its share on a wheelage basis of the cost of maintenance and of those expenses of operation and management usual and proper in such cases.

(e) The New Orleans and San Francisco Railroad Company,

and all other contributing railroads using the belt line, shall have the right to operate their own locomotives, cars and equipment over the said public belt under the control of the "Public Belt Authority," provided that all railroads using said tracks shall belt all cars to and from their respective lines over all switches, spurs and sidings forming part of the public belt tracks, free of all cost.

Unless otherwise ordered by the "Public Belt Authority," or until said "Public Belt Authority" is operating its own equipment over said system, completed to Clouet street, the New Orleans and San Francisco Railroad Company, agrees to belt cars belonging to connecting railroads or to individuals, firms or corporations over the belt line, and over all switches, spurs and sidings connected therewith and forming part thereof without discrimination, treating and handling such belted cars as justly and as equitably as if they were its own cars, coming off its own lines, charging for such service, not exceeding \$2.00 per car, for placing a car and returning same empty, or vice versa; provided, however, that a similar obligation shall be hereafter placed on every contributing railroad hereafter admitted to the use of said belt tracks, and provided, further, that said New Orleans and San Francisco Railroad Company shall not, under this clause, or under any other clause of this ordinance, be obligated to belt cars for any railroad company not now operating a line in the City of New Orleans, unless such other railroad shall become a contributor, as herein provided to the belt road construction fund.

(f) That all controversies between the said New Orleans and San Francisco Railroad Company, on the one side, and the city or her public belt officials, or any other company or companies to which the city or her Public Belt Authority may grant the use of said tracks and appurtenances on the other side, relative to the use of said tracks and appurtenances, or to the cost of construction or maintenance thereof, or to the rules and regulations relative to the movement and handling of cars, trains and traffic thereon, and thereover, shall be submitted to the arbitration of three disinterested persons, one to be selected by said New Orleans and San Francisco Railroad Company, the second by the city, or her Public Belt officials, or such other company or companies as the case may be, and the third by the two thus chosen, and the decision of this 538 tribunal, or of any two of them, shall have the effect of an amicable composition.

(g) That all damages to life and property caused by the fault or negligence of the officers or employees of any company, while operating over said tracks, shall be borne exclusively by said company, and the city shall in no respect be responsible therefor.

(h) That the New Orleans and San Francisco Railroad Company, its lessees, successors and assigns, shall not discriminate at any time, illegally or unjustly, against the City of New Orleans.

(i) That the said railroad company, its lessees, successors and assigns, shall be bound to switch or belt, without unreasonable delay, over its main tracks within the limits of the City of New Orleans,

and over all other tracks laid in the public streets or public places within said city limits, owned, controlled or leased by said railroad company, its lessees, successors or assigns, except into the private property or terminals of said railroad company, that is, depots, warehouses, elevators, and other like terminals, owned or operated by the railroad company, its lessees, successors and assigns, for a reasonable compensation, not to exceed the maximum charge of \$2.00 per car, their own cars and the cars of any other railroad company, now operating, or which may hereafter operate, a line of railroad within the City of New Orleans, also cars belonging to individuals, firms or corporations, when such service shall be requested, and no unjust discrimination shall be made between different companies or individuals entitled to and requesting such service; provided, that said railroad company, its lessees, successors and assigns shall not be obliged to switch cars for other railroad companies for a less sum than other railroad companies charge for a similar service, until such time as other railroad companies operating in the City of New Orleans agree with the City of New Orleans upon a fixed switching or belting charge; nor shall it be obliged to perform such service on its main tracks for any railroad that refuses to perform the same service for it at the same charges and under the same conditions. All cars coming to the city over the lines of the New

539 Orleans and San Francisco Railroad Company shall be delivered to points on their tracks free of belting charge.

(j) That the movement of trains, cars and traffic on and over said tracks from the upper limits of the city to Henderson street until the city completes her belt system to Clouet street and begins to operate them as part of said system, shall be under the direction, control and management of said company, and when the city shall begin to operate said tracks as part of her completed belt system, the movement of trains, cars and traffic on and over said tracks shall be, under the sole direction, control and management of the Public Belt Authority of the City of New Orleans, provided always, that there shall be no discrimination against the cars, trains and traffic of said company, or of any other company granted as above provided the right to use said tracks. Until the city begins to operate said tracks as part of her completed belt system, the whole cost of maintenance shall be borne by the New Orleans and San Francisco Railroad Company, unless during this period, the Public Belt Authority shall grant to other railroads a right of operation over said tracks similar to that herein granted to said company, in which event the cost of maintenance and the usual and proper parts of the cost of operation and management shall be borne on a wheelage basis by all companies operating over said tracks. If, however, the belt is not completed to Clouet street by July 1st, 1907, the sole control and management of said belt tracks shall revert to the Public Belt Authorities of the City of New Orleans, July 1st, 1907.

* * * * *

This ordinance was passed over the veto of the then Mayor of the City, Mr. Capdevielle, who at once brought suit to annul it.

At certain places along the river front, the belt road would have

to pass through territory within the limits of the port of the city, under the jurisdiction of the Board of Commissioners of the Port, and permission for it to pass had been obtained from said Board; but the permission had been granted only under the express condition that it should "remain in force only so long as the public railroad is operated and controlled by the Board of Commissioners of the Public Belt Railroad in accordance with the provisions of the ordinance creating that commission."

Now, whereas the ordinance creating said Belt Railroad commission provided that

"The management and control of the Public Belt Railroad shall be separate and distinct from that of any railroad entering New Orleans, and shall remain forever the property of the City of New Orleans, and no employee, director or officer of any State or interstate railroad shall be employed by or allowed to act as director commissioner or manager of the Public Belt Railroad," the said Frisco ordinance, allowed the railroads to participate in considerable degree in the operating of the belt. The Board of Commissioners of the Port, or Dock Board, considered this to be a violation of the express condition upon which alone it has granted permission to the belt road to pass through the territory of the port, and therefore it promptly brought suit to enjoin the Frisco from carrying out the ordinance "in so far as it authorizes the construction and maintenance of a railroad on the wharves or landings of the port of New Orleans."

The said suits—the Capdevielle suit and this Dock Board suit, came to this court. By two judgments of this court, one of which, that in the Capdevielle suit, became final on June 3, 1903, and the other of which, that in the Dock Board suit, became final on June 24, 1904, (Capdevielle, Mayor, vs. New Orleans & S. F. R. R. Co., 110 La., 904; Board of Commissioners vs. N. O. & San F. R. R. Co., 112 La., 1011), the demand of the Capdevielle suit was rejected and that of the Dock Board suit was maintained. The court took the view that the only respect in which the subject matter of the ordinance was not within the authority of the city was in the belt road traversing the territory of the port; and that on that point, the port authorities alone had a right to complain.

Over two months after the termination of the Capdevielle suit, but while the Dock Board suit was still pending, the ordinance which forms the subject matter of the present suit was adopted. We are concerned in this suit only with that part of it relating to the belt railroad, which we give in the margin.

* * * * *

Margin.

SEC. 3. Be it further ordained, etc.,

That whereas, under Ordinance No. 1615, N. C. S., the New Orleans and San Francisco Railroad Company, its successors or assigns, have been granted the right to construct at their own cost

and expense, the double track Belt line over the Belt reservation on the river front, from the present end of the Public Belt on the upper side of Audubon Park to Henderson street, and under said ordinance company dedicates said tracks to perpetual public use, therefore under the Belt provisions of said Ordinance No. 1615, N. C. S. "and with the limitations therein which recognize and preserve the present and future rights of the City of New Orleans over the projected Public Belt Railroad," the Louisiana Railway and Navigation Company is hereby granted a right of way over the double track Belt line and reservation on the river front of the City of New Orleans from the upper limits of the City of New Orleans to Henderson street, upon the following terms and conditions:

(a) That when said Louisiana Railway and Navigation Company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, the said company shall pay to the City of New Orleans, the sum of fifty thousand dollars (\$50,000.00) which sum is to be deposited with the Fiscal Agent of the City of New Orleans, to the credit of a special fund, and said fund shall not be used for any other purpose than the extension, equipment and operation of said Public Belt Line and the construction of said Belt tracks, switches, side tracks, spurs and turn-outs, and the payment of the costs of right of way for such Belt system; but no portion of this money shall be used for expenses of operation until the Belt tracks are completed to Clouet street, and when said company shall be ready to begin to operate its engines, trains and cars as above provided, the said company shall deliver to the Fiscal Agent of the City of New Orleans, bonds or other securities, satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company with the foregoing obligation, and to be returned to said company when said company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, and shall have paid said sum of fifty thousand dollars to said Fiscal Agent. If, for any reason, said company shall not have or be accorded the right to operate its engines, trains and cars over said Belt tracks, as provided in this ordinance, then such securities shall be returned to said company by said Fiscal Agent.

(b) That in consideration of the payment of the above sum, the Louisiana Railway & Navigation Company shall have the right to operate its own locomotives, cars and equipment over the said Public Belt of the upper City limits to Henderson street; provided that said company and all railroads using said tracks shall belt all cars to and from their respective lines over all switches, spurs and sidings forming part of the Public Belt tracks, free of cost.

(c) That in the event of the New Orleans and San Francisco Railroad Company, its successors or assigns, failing without legal excuse, to build said Belt tracks from the upper side of Audubon Park to Henderson street, on or before July 1st, 1904, the Louisiana Railway & Navigation Company shall build the same from the upper side of Audubon Park to Henderson street, under the terms and conditions

of Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.; and, in case said Louisiana Railway & Navigation Company shall build said tracks, it is hereby granted the right and privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of said Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., said Louisiana Railway & Navigation Company assuming the obligation of the New Orleans and San Francisco Railroad Company under said paragraph of said ordinance, and being hereby granted all the rights and privileges of said New Orleans and San Francisco Railroad Company, its successors or assigns, under said Paragraph 10 of Section 2 of said Ordinance, except as hereinafter provided, such construction of said tracks from the upper side of Audubon Park to Henderson street to be in lieu of the payment of \$50,000, referred to in Paragraph (a) of this section; provided, that said Louisiana Railway & Navigation Company shall complete the said tracks to Henderson street within one year from the time the City shall furnish the clear and undisputed right of way, it being always understood that said Louisiana Railway & Navigation Company assumes all the obligations of the New Orleans & San Francisco Railroad Company under Paragraph 10 of Section 2 of said Ordinance No. 1615, N. C. S.; and provided that, as soon as said Belt tracks shall be completed to Henderson street, the same shall be turned over to the immediate ownership of the City of New Orleans, and to be under the control and management of the Public Belt authority; and provided, further that said Louisiana Railway & Navigation Company shall on July 1st, 1904, deposit with the Fiscal Agent of the City of New Orleans, bonds or other securities satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company with the foregoing obligation and to be returned to said company when said company shall have built and completed said Belt tracks from the upper side of Audubon Park to Henderson street, and provided, further, that in case said company shall be prevented from building said Belt tracks or any portion of the same on account of the City not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said Fiscal Agent.

Provided further, that nothing in this ordinance or in this section or clause shall be construed as a waiver or abandonment of the rights that the City of New Orleans now has or may hereafter have under and by virtue of the provisions of Ordinance No. 1615, N. C. S., and provided further, that nothing in this ordinance, section or clause shall be construed to relieve the New Orleans & San Francisco Railroad Company, its successors or assigns, from any of its obligations to the City of New Orleans, arising under the provisions of Ordinance No. 1615, N. C. S.; and especially under Paragraph 10 of Section 2 of said ordinance, it being distinctly understood and declared that the City shall be entitled to enforce all its rights under said Ordinance No. 1615, N. C. S., precisely as if this present ordinance had not been passed at all.

(d) That in the event the New Orleans & San Francisco Railroad Company, its successors and assigns, shall from any cause complete only a portion of the tracks from the upper side of Audubon Park to Henderson street, the Louisiana Railway & Navigation Company, its successors and assigns shall have the right to operate its own locomotives, cars and equipment over such portion of the tracks as is already built, and as may be built by the New Orleans & San Francisco Railroad Company, its successors and assigns, and for such privilege shall pay to the City of New Orleans such proportion of the sum provided in Clause (a) of this paragraph as the tracks so constructed and used by said Louisiana Railway & Navigation Company bear to the whole length of the tracks from upper city limits to Henderson street.

(e) Unless otherwise ordered by the "Public Belt Authority" or until said "Public Belt Authority" is operating its own equipment over said system, completed to Clouet street, the Louisiana Railway & Navigation Company agrees to belt cars belonging to connecting railroads or to individuals, firms or corporations, over the belt line, and over all switches, spurs and sidings connected therewith and forming part thereof, without discrimination, treating and handling such belted cars as justly and as equitably as if they were its own cars coming off its own lines, charging for such service, not exceeding

\$2.00 per car, for placing a car and returning same empty, or vice versa; provided, however, that a similar obligation shall be hereafter placed on every contributing railroad hereafter admitted to the use of said belt tracks, and provided further, that said Louisiana Railway & Navigation Company shall not under this clause, or under any other clause of this ordinance, be obligated to belt cars for any railroad company not now operating a line in the City of New Orleans, unless such other railroad shall become a contributor, as herein provided to the belt road construction fund.

(f) That all controversies between the Louisiana Railway & Navigation Company on the one side and the Public Belt Authority, or any other company or companies to which the City or her Public Belt Authority may grant the use of said tracks and appurtenances on the other side, relative to the use of side tracks and appurtenances or the cost of construction or maintenance thereof, or the rules and regulations relative to the movement and handling of cars, trains and traffic thereon and thereover shall be submitted to the arbitration of three disinterested persons; one to be selected by said Louisiana Railway & Navigation Company; the second by the Public Belt Authority, or such other company or companies, as the case may be; and the third by the two thus chosen; and the decision of this tribunal, or any two of them, shall have the effect of an amicable composition.

(g) That all damages to life and property caused by the fault or negligence of the officers or employes of any company, while operating over said Belt tracks, shall be borne exclusively by said company, and the City shall in no respect be responsible therefor.

(h) That the Louisiana Railway & Navigation Company, its

lessees, successors and assigns shall not discriminate at any time, illegally or unjustly, against the City of New Orleans.

(i) That the said Louisiana Railway & Navigation Company, its lessees, successors and assigns, shall be bound to switch or belt, without unreasonable delay over its main tracks, within the limits of the City of New Orleans, and over all other tracks laid in the public streets or public places within said city limits, and all switches connected therewith, owned, controlled or leased by said
546 railway company, its lessees, successors or assigns, except into the private property or terminals of said railway company, that is, depots, warehouses, elevators and other like terminals, owned or operated by the railway company, its lessees, successors and assigns, for a reasonable compensation, not to exceed the maximum charge of \$2.00 per car, its own cars, the cars originating on the Public Belt, and the cars of any other railroad company now operating, or which may hereafter operate a line of railroad within the City of New Orleans, also cars belonging to individuals, firms or corporations, when such service shall be requested and no discrimination shall be made between different companies or individuals entitled to and requesting such service; provided, that said railway company, its lessees, successors and assigns, shall not be obliged to switch cars to or from the tracks of other railroad companies for a less sum than other railroad companies charge it for a similar service, until such time as other railroad companies operating in the City of New Orleans agree with the City of New Orleans upon a fixed switching or belting charge; nor shall it be obliged to perform such service on its main tracks for any railroad that refuses to perform the same service for it on its main tracks and for the same charges and under the same conditions. All cars coming to the City over the lines of the Louisiana Railway & Navigation Company shall be delivered to points on its tracks free of belting charges.

(j) That the movement of trains, cars, and traffic on and over said tracks from the upper limits of the City to Henderson street until the City completes her Belt system to Clouet street, and begins to operate them as a part of said system, shall be under the joint direction, control and management of the New Orleans & San Francisco Railroad Company, its successors and assigns, and the Louisiana Railway and Navigation Company, its successors and assigns, unless during this period the Public Belt Authority shall grant other railroads a right of operation over said tracks similar to that herein granted to the Louisiana Railway & Navigation Company, in which
547 event the control and management of movement of trains, cars and traffic over said tracks to Henderson street, shall be under the joint control of such companies as may be granted the same right of operation over said tracks, and when the City shall begin to operate said tracks as part of her Belt system, the movement of trains, cars, and traffic on and over said tracks shall be under the sole direction, control and management of the Public Belt Authority of the City of New Orleans, provided always that there shall be no discrimination against the trains, cars and traffic of the Louisiana Railway & Navigation Company or any other com-

pany, granted the right to use said tracks. Until the City begins to operate said tracks as part of her Belt system, the whole cost of maintenance, operation and management shall be borne jointly by the New Orleans & San Francisco Railroad Company, its successors and assigns, and the Louisiana Railway & Navigation Company, its successors and assigns on a wheelage basis, unless during this period the Public Belt Authority shall grant to other railroads a right of operation over said tracks similar to that herein granted to said Louisiana Railway & Navigation Company, in which event, the cost of maintenance and the usual and proper parts of the cost of operation and management shall be borne on a wheelage basis by all companies operating over said tracks. If, however, the Belt is not completed to Clouet street by July 1st, 1907, and the tracks to Henderson street, or any part thereof, are constructed by the New Orleans & San Francisco Railroad Company, the sole control and management of said Belt tracks shall revert to the Public Belt Authorities of the City of New Orleans; provided always, if for any reason the City of New Orleans or her Public Belt Authorities shall not assume control and management of said tracks on July 1st, 1907, the Louisiana Railway & Navigation Company shall have the same right of control and management of the movement of trains, cars, and traffic over said tracks as has heretofore, or may be hereafter granted to any railroad company.

(k) That in the event said Belt tracks shall be completed to Clouet street, and said Louisiana Railway & Navigation Company shall desire to use that portion of the Belt which may be built from Henderson street to Clouet street, it shall have the right to operate its trains, cars, and traffic over the completed Belt, upon the payment to the Fiscal Agent of the City for the use and benefit of the Belt Fund, of a sum which, added to the sum to be paid under Clause (a), Section 3, of this ordinance, shall make the total sum paid by said Louisiana Railway & Navigation Company equal to the cost of the construction of the Belt tracks from the upper side of Audubon Park to Henderson street, expended by the New Orleans and San Francisco Railroad Company, its successors or assigns, in the construction of said tracks from the upper side of Audubon Park to Henderson street, as provided in Ordinance No. 1615, N. C. S.;

"Provided that in the event the Belt shall be extended to Clouet street, and that the Louisiana Railway & Navigation Company shall not avail itself of the right to pay the additional sum as above provided and use the Belt to Clouet street, within a period of five years from the time said belt is completed to Clouet street, then in that event, the said Louisiana Railway & Navigation Company shall pay to the Public Belt Authority of the City of New Orleans the sum of thirty thousand dollars (\$30,000), the use and destination of said sum to be the same as provided for in the payment of the fifty thousand dollars (\$50,000,) as above provided for. Said additional payment of thirty thousand dollars shall in no wise, however, authorize the using of the Belt below Henderson street by the said Louisiana Railway & Navigation Company.

"Provided further that any use by the Louisiana Railway & Navigation Company of the Belt track from Henderson street to Clouet street, after the same shall have been completed, shall be deemed conclusive evidence of its agreement to accept the use of said entire Belt, but shall not bind the said Louisiana Railway & Navigation Company as admitting the cost of the construction from the upper limits of Audubon Park to Henderson street, to be the amount stated by the New Orleans and San Francisco Railroad Company, its successors and assigns. It being understood that this right is granted under the limitations of Ordinance No. 1615, N. C. S., which recognize and preserve all the present and future rights of the City of New Orleans over the projected Belt Railroad from the upper limits of the City to Clouet street.

* * * * *

549 It is one of the fifteen sections of the ordinance which is very lengthy, and very broad in its scope, embracing the entire municipal legislation necessary for making provision for the entry of the defendant railroad (then in course of construction) into New Orleans,—granting the necessary rights of way over streets, and making concessions and grants as inducements to the defendant railroad to come.

As we shall have occasion hereafter to refer with particularity to what is here given in the margin we will content ourselves at present with the general statement that it grants to the defendant the use of the belt road from the upper city limits to Henderson street in consideration of \$50,000, to be paid, and provided: that, in case the Frisco fails without legal excuse to construct the five miles of road called for by its contract, the defendant railroad is to construct same on the same terms and conditions,—succeeding to all the rights and obligations of the Frisco; and its doing the work is to be in lieu of paying the \$50,000; that as security for the performance of this obligation the defendant railroad is to deposit in the hands of the Fiscal Agent of the city, on July 1, 1904, good bonds, or other securities, to the amount of \$50,000. In the event the Frisco should construct only a portion of the five miles of road the defendant railroad is to have the use of the two miles constructed and of whatever portion of the five miles might be thus constructed, and, instead of paying the full \$50,000, is to make payment in proportion.

The defendant made formal acceptance of the ordinance, thereby converting it into a contract.

When the adverse decision in the Dock Board suit was rendered the Frisco and the city looked upon it as having put an end to the schemes by which the construction of the belt road was to be effected by means of contributions from the railroads; and the defendant appeared to have taken the same view, for it remained quiescent, gave no sign of its intending to take any further interest in the matter, for seventeen months—until November 10, 1905. It then deposited \$50,000, of bonds with one of the fiscal agents of the city as a guarantee for the carrying out of the contract, and notified the mayor and the city council of the deposit having been made.

550 But the city had, in the meantime, in October 1904, thirteen months before the date of the deposit, passed an ordinance reorganizing the Belt Road Commission, and making adequate financial and other provision for the construction and operation of the belt, and repealing all conflicting ordinances. Against that action on the part of the city, defendant had made no protest; although defendant could not but have known of it, since the measure had attracted a great deal of attention; in fact, had been looked upon as so important as to constitute an epoch in the industrial life of the city, and had been celebrated as such by a mass meeting at which speeches were made. Following defendant revival of interest in the ordinance, as shown by the making of the \$50,000. deposit, fruitless conference took place between defendant's officials and the city authorities; and then, on the 16th day of May, 1906, the defendant undertook to begin the construction of the five miles of road; and the present suit was promptly instituted enjoining it from doing so.

Immediately after the injunction had been taken, the Board of Commissioners of the Belt Railroad began the work of constructing the belt road, and the road has now been in full operation for some years.

The grounds of the injunction are—

First. That the contract with the defendant is null, because it divests the people of the city of their property without due process of law, and impairs the obligation of the city's contract with the Illinois Central under which the two miles of road were constructed; and because it stipulates something impossible, namely; the construction upon the territory of the Dock Board of a belt road which should be in some degree under the control of the railroads.

551 Second. That the contract with the defendant, if ever valid, has terminated, because it was subject to suspensive conditions which can never be accomplished; that as to that part of the contract by which the defendant was to have the use of the belt road down to Henderson street on paying \$50,000. the condition was that the five miles of said road from the upper boundary of Audubon Park down to Henderson street, or at least a portion thereof, should be built by the Frisco; that as to that part of the contract by which the defendant was to be under the obligation to build said five miles of road in case the Frisco failed to do so, the condition was that the failure of the Frisco to do the work should have been without legal excuse; that as to the contract as a whole the condition was that the defendant company should deposit with the Fiscal Agent of the city on April 1, 1904, \$50,000. of bonds as a security for the fulfillment of the contract; that these conditions can never be accomplished because the Frisco has given up all idea of building said five miles of road and has done so with good legal excuse, and the 1st day of July, 1904, has been suffered by defendant to pass by without any deposit having been made.

The further allegation is made that the Board of Commissioners of the Belt Railroad had already begun the construction of the belt road, under the provisions of the ordinance passed to that effect,

when the defendant, on May 16, 1906, made the attempt to begin the work.

The defendant filed several exceptions, and, upon their being overruled, answered to the merits.

The first of the exceptions is that of *res judicata*. That exception is urged in bar of the contentions that the contract divested the people of the city of their property without due process of law and impaired the obligation of the contract between the city and the Illinois Central Railroad; and that the city was without authority to enter into the contract. In support of this plea, the judgment in the suit of Capdevielle, Mayor, against the N. O. & San Francisco Railroad is relied upon. The plea was properly overruled. *Res judicata* obtains only when the suit in which it is pleaded is between the same parties or their successors, or assigns, as the suit in which was rendered the judgment pleaded in bar; and the defendant was not a party to the Capdevielle suit, and is not a successor or assign of any party to that suit. Whatever rights it may have, or obligations it may be under, are derived wholly from the contract involved in the instant suit, which was entered into after the Capdevielle suit had terminated, and is distinct and separate from, and independent of, the contract involved in that suit. True, the defendant was to do the work called for by the Frisco ordinance in case the Frisco failed to do it, but defendant was not to do this as an assign of the Frisco, or under, and by virtue of, the Frisco contract, but exclusively under, and by virtue of, the contract involved in the instant suit. True, also, its lawyers filed a brief as *amici curiæ* in the Capdevielle suit, and the court took cognizance of the brief; but the filing of a brief, even though the court take cognizance of it, does not make a person a party to a suit so as to be bound by the judgment in the suit.

The next plea is that of estoppel. This plea is founded on the fact that, in her answer to the Capdevielle suit, the city alleged that the contract with the Frisco was valid; and also on the alleged further fact that on the faith of securing from the city the ordinance whose validity is now assailed the defendant expended over \$3,000,000.00 in constructing its road into New Orleans, and in providing terminals on the river front.

The answer to the first ground of estoppel here urged is that a party is not estopped by allegations of law unsuccessfully made in a former suit. *Hornor vs. McDonald*, 52 Am. 406; *Godwin vs. Newstadt*, 47 Amm. 850; *Stockmeyer vs. Oerthing*, 38 An. 100.

The answer to the second of the grounds of estoppel is that, in the first place, the city is not assailing the validity of the entire ordinance but only of that part of it relating to the belt railroad; that the other parts, making valuable grants and concessions to the defendant, of which the defendant is today in the full enjoyment, are not assailed; and, in the second place, that the part of the ordinance relative to the belt road spoke for itself, and that if defendant has put an erroneous interpretation upon it and chosen to act upon that interpretation, defendant has but itself to blame.

Coming to the merits, we can dispose of the first grounds of injunc-

tion, those relating to the nullity of the contract because *ultra vires*, and because divesting the people of the city of New Orleans of their property without due process of law and impairing the obligation of the contract with the Illinois Central, by saying that these grounds were fully considered by this court in the case of *Capdevielle, Mayor of New Orleans, vs. N. O. & San Francisco R. R. Co. supra*, and need not be gone over again.

The allegation that the Board of Commissioners of the Belt Railroad had already begun the construction of the five miles of road from the upper limit of Audubon Park down to Henderson street when defendant made its attempt to begin work on May 16, 1906, is not supported by the evidence.

The question of whether the deposit of \$50,000. of bonds was or not made within the limit of time allowed for making it, is unimportant. The making of this deposit was not to be a condition precedent of the coming into existence of defendant's obligation, or right, to do the work. True, the clause stipulating it is added as a proviso; and is, therefore, in form, expressive of a condition precedent; but the manifest intention was that the defendant should be obliged to do the work whether it chose to make the deposit within the time fixed or not. It will be noticed that the stipulation that

the tracks should after completion be turned over to the Belt
554 Road Authorities is in like manner in the form of a proviso; but no one most assuredly, would say it was intended to be a condition precedent. Read as a whole, the ordinance manifestly means that the defendant "shall" build the five miles of tracks; "shall" complete same within one year; and shall furnish security. The sole effect of this deposit clause was to confer upon the city the right to require the deposit to be made; and, in default of its being made, to put an end to the contract in the manner provided by law for enforcing the resolutive condition in commutative contracts.

We agree with plaintiff, however, that the contract was subject to a suspensive condition, and that this condition had become impossible of realization, and the contract had, in consequence, fallen through, when plaintiff made its attempt to begin work and the injunction was taken.

The two ordinances, that in favor of the Frisco and that in favor of defendant,—embody a scheme for the construction of the belt railroad system through the agency of the railroads for whose use the same was intended and by means of contributions from them.

In the first of these ordinances, the city said to the Frisco:—I have already two miles of my projected belt system constructed. You construct, at your own expense, but under the supervision of the Board of Commissioners of my Belt Railroad, five miles more. My said Board will keep an account of your expenditure in this work and every railroad desiring to use my belt system will be required to contribute a sum equal to your said expenditure to a fund which shall be used exclusively towards completing my said belt system. In consideration of your doing this, you shall have a right of way over my said belt system for your locomotives, trains and cars; and until

the belt shall have sufficiently approached completion to justify my having an equipment of my own to operate it you shall be my
 555 agent in operating it, and in doing so, you shall observe the following regulation &c., &c.

In the second of the ordinances, the city said to defendant: With a view to carry out my project of constructing a belt railroad system, I have made arrangements with the Frisco to prolong five miles lower down the two miles of tracks already constructed. I will give you a right of way over these seven miles of tracks for your locomotives, trains and cars, for \$50,000.; and in case the Frisco does not build said five miles of tracks, then, I make with you for the construction of same the same arrangement precisely which I have made with the Frisco. I make you this proposition only in the event the failure of the Frisco to build the said tracks is without legal excuse, that is to say, that the opposition which the Dock Board is making to the carrying out my arrangement with the Frisco is not sustained by the court; for, as a matter of course, that opposition would be as fatal to the present proposed arrangement with you as to the same arrangement with the Frisco. Such a thing is possible, however, as that the Frisco should default with its contract after having partially executed it by constructing a part of the five miles of road; in that event you will pay for the use of the constructed part of my belt road a proportional part of the \$50,000., and you will continue with the construction of the five miles of tracks on the terms and conditions agreed on. In case the five miles of tracks are built by the Frisco, and not in whole or in part by you, and you have paid the \$50,000. for the use of the seven miles of tracks, then, after you shall have used these seven miles of tracks for five years, and in the event the belt line is completed to Cluett street, you shall contribute \$30,000. additional to the belt construction fund; and if ever you desire to use the entire belt system, or any part of it, below Henderson Street, then you shall contribute to the belt construction
 556 fund an amount which, when added to the amount already paid by you will equal the expenses incurred by the Frisco in constructing the five miles of tracks.

Defendant accepted the ordinance as passed—accepted the proposition as made; hence, its contract has no greater scope then the ordinance, and is not different from it.

That the foregoing is the proposition contained in the ordinance is, we think, perfectly plain from the mere perusal of the ordinance. The parties manifestly had in contemplation the construction of a completed belt; not of a part of a belt, or detached, disconnected stretches of railroad tracks. The Frisco was to prolong five miles lower down the two miles of tracks already constructed; and then the work was to be continued by means of contributions from the other railroads; each of these other railroads contributing an amount equal to the cost of the construction of the five miles of tracks. All this is expressly stated in the ordinance, which obligates the Frisco to construct the five miles of tracks, and, then, for the continuation of the work of construction, provides, as follows:

"In order to provide for the completion of said belt system to

Cluett street and its further continuation and construction, said public belt authorities shall have the right and power to grant the right of use of said tracks to any railroad now in, or that may hereafter come into the city of New Orleans, exacting of each of said railroads to which said right of use is granted, a sum equal to the amount expended as aforesaid by the N. O. & San Francisco R. Co. for construction of the belt tracks, switches &c., as part of the public belt system of the City of New Orleans."

The city did not profess to have any funds with which to build a foot of tracks, and did not propose to obligate herself to build a foot of tracks. She simply proposed to the Frisco the scheme contained in the ordinance, and the Frisco accepted the proposition as made. It was not the grant of the use of certain tracks already built and of other tracks which the city would build; but it was the tender of a proposition by which a belt system was to be built through the agency of the railroads and by means of contributions from them; and the railroads were to have the use of the belt system thus constructed. The city made precisely and identically the same proposition to defendant. The only difference between the two ordinances being that in case the Frisco had built the five miles of road, then the defendant would not have built same and would not have had the rights and assumed the obligations of the Frisco, but would simply have had the right to use certain parts of the belt tracks on making certain money payments.

The right of way which the Frisco ordinance granted to the Frisco and which defendant's ordinance granted to defendant in case defendant succeeded to the rights and obligations of the Frisco, was not over two miles or seven miles, or any part or parts of railroad tracks; but over the "completed belt system." True, the right of way for which defendant was to pay the \$50,000. was not to extend beyond the seven miles of tracks or lower down than Henderson street; but we are not now concerned with that part of defendant's contract. That part of defendant's contract was to come into operation only in the event the Frisco built the five miles of road in whole or in part; and the Frisco built none whatever. We are concerned only with that part of defendant's contract by which, on the default of the Frisco, defendant was to take up the contract of the Frisco, under the same terms and conditions, and fulfill it.

From the foregoing, and, in fact, from almost every sentence of these ordinances, it is plain that these ordinances embody a scheme for the construction of the entire belt system through the agency of the railroads and by means of contributions from them.

Now, when the Dock Board made effective opposition to the carrying out of that scheme, these ordinances, embodying that scheme, and whose sole object was to carry it on necessarily became a dead letter.

So evident was this, that, without one word being said on the subject, the city and the Frisco let the project drop, and defendant was equally silent and acquiescent; and so continued for seventeen months until some time after the city had made other provision for the construction of the belt, when defendant set up the present

pretensions, which were very much the appearance of an after-thought.

If the city had allowed the defendant to go on and do the work which the Frisco was to have done, and thereby stand in place of the Frisco and be invested with all its rights and obligations, the situation would have been that the defendant would have had the right and been under the obligation to operate the belt railroad until the time had come for the Belt Railroad Commission to take charge with its own equipment for operating the belt; the defendant would have had the right to operate its locomotives trains and cars perpetually over the belt system; all controversies arising between defendant and the belt authorities would have had to be decided by two arbitrators, one of whom to be appointed by the defendant and the other jointly by the Belt Commission and all the other railroads using the belt. Such are the terms of the contract. And the consequence would have been that the conditions subject to which the Dock Board granted permission to the Belt Road Authorities to operate the belt road within the limits of the port, would have been violated, and the whole belt railroad project would have become impracticable. Now, it stands to reason that this ordinance, whose sole object and purpose was to devise, propound and carry out a scheme for providing the city with a belt railroad system, cannot be so interpreted as to block not only the particular

559 scheme thus devised and propounded but any other which the city might devise for the same purpose; and this, for all time; or, at any rate, for so long as the Dock Board should persist in its opposition to allowing a right of way across the territory of the port to any belt road with whose management any railroad company should have the right to interfere in any way.

At the time the Frisco ordinance was passed, the opposition of the Dock Board was not known or foreseen; and, in consequence, no provision was made for that contingency. But when defendant's ordinance was passed, the Dock Board suit was pending, and, accordingly, the clause was inserted that defendant should be obliged, or have the right, to build the five miles of road only in the event the Frisco's failure to do the work should have been "without legal excuse."

Defendant, naturally, contends that the contract resulting from its acceptance of the ordinance was absolute and unconditional.

Its learned counsel, in endeavoring to show this, argues that the contract conferred upon defendant, the absolute and unconditional right to have the right of way over the belt tracks down to Henderson street upon either paying \$50,000. or constructing the five miles of tracks from the upper side of Audubon Park down to Henderson Street in case the Frisco did not construct them; and that inasmuch as defendant would have constructed the five miles of tracks if the city had not prevented it from doing so, the legal situation stands just as if defendant had done the work, subject only to the obligation of defendant to reimburse the city the amount which the evidence in this case shows was expended by her in doing the work.

In opposition to the view, taken by the city and hereinabove

adopted, that the ordinance embodied a scheme for the construction of the entire belt system through the agency of the railroads and by means of contributions from them, and was conditional upon the carrying out of that scheme proving to be practicable, defendant contends that the contract was not thus indivisible, but was, on the contrary, divisible; that it contemplated that the opposition of the Dock Board might prevent the construction of the entire five miles of tracks, but that, at all events the part of the five miles of tracks not infringing upon the territory of the Dock Board should be constructed. In support of that view, and as conclusive proof of its correctness the learned counsel for defendant point to the concluding part of paragraph (c) and the whole of paragraph (d), reading as follows:

"And provided, further that said Louisiana Railway & Navigation Company shall on July 1st, 1904, deposit with the Fiscal Agent of the City of New Orleans, bonds or other securities satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company with the foregoing obligation and to be returned to said company when said company shall have built and completed said belt tracks from the upper side of Audubon Park to Henderson street; and provided further that in case said company shall be prevented from building said Belt tracks or any portion of the same on account of the City not furnishing the right of way under the terms of Ordinance No. 1615 N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said Fiscal Agent.

"Provided further, that nothing in this ordinance or in this section or clause shall be construed as a waiver or abandonment of the rights that the City of New Orleans now has or may hereafter have under and by virtue of the provisions of Ordinance No. 1615 N. C. S., and provided further, that nothing in this ordinance, section or clause shall be construed to relieve the New Orleans & San Francisco Railroad Company its successors or assigns, from any of its obligations to the City of New Orleans arising under the provisions of Ordinance No. 1615 N. C. S.; and especially under Paragraph 10 of Section 2 of said ordinance it being distinctly understood and declared that the City shall be entitled to enforce all its rights under said Ordinance No. 1615 N. C. S., precisely as if this present ordinance had not been passed at all.

(d) That in the event the New Orleans & San Francisco R. Company, its successors and assigns, shall from any cause complete only a portion of the tracks from the upper side of Audubon Park to Henderson street, the Louisiana Railway & Navigation Company, its successors and assigns shall have the right to operate its own locomotives, cars and equipment over such portion of the tracks as is already built, and as may be built by the New Orleans & San Francisco Railroad Company, its successors and assigns, and for such privilege shall pay to the City of New Orleans such proportion of the sum provided in Clause (a) of this paragraph as the tracks so constructed and used by said Louisiana Railway & Navigation

Company bear to the whole length of the tracks from upper city limits to Henderson street."

The learned counsel also argue that the object sought to be attained respectively by the parties was, on the part of the city, to procure the construction of additional miles of belt road, and not necessarily of the entire belt road; and, on the part of defendant, to secure a means of reaching its river terminals, a site for which it had acquired at immense cost, which site is situated above Toledano street, and therefore would be reached by the belt being constructed that far down.

These contentions have already been met by what has been said hereinabove touching the nature and purpose of the ordinance; we proceed, however, to answer them more specifically, and, in doing so, shall avoid entering into unnecessary details.

562 In the ordinance, provision is made for three contingencies; first, that the Frisco shall construct the entire five miles of tracks down to Henderson street; second, that the Frisco shall construct a part of the five miles of tracks, and then default in its contract; third, that the Frisco shall construct no part of the five miles of tracks.

The first two of these three contingencies failed; the Frisco constructed no part of the tracks. The effect of this, was to do away entirely with those phases, or aspects, of the contract designed to meet and provide for those two contingencies. The situation became the same as if no provision whatever had been made in the contract for those contingencies; or, in other words, as if the contract had been, from the beginning, one simply to construct the five miles of tracks on the terms and conditions specified in it.

So plain is this, that confirmation of it can hardly be necessary. If such confirmation were needed, however, it would be found in the fact that defendant itself adopted and acted upon that view. It made no effort, or attempt, whatever to avail itself of that phase of the contract by which it was to have certain rights in consideration of a money payment; but proceeded to make the deposit called for by paragraph (c) of the ordinance, which is the paragraph providing for the construction of the tracks in case the Frisco failed to construct any part of them. The Deposit was in express terms restricted to "the terms and conditions of Paragraph (c)."

Defendant understood perfectly, as no one who reads the contract as it is written can fail to understand, since the language is express and explicit, that in case the Frisco failed to build any part of the tracks, all that part of the contract by which defendant was to have certain rights in consideration of a money payment was to become a dead letter, and be superceded entirely and completely by the

563 alternative part according to which defendant was to step into the shoes of the Frisco in building the five miles of tracks, and be entitled to the same rights and be under the same obligations as the Frisco. The effect was that the contract with defendant ceased to call for a money payment, and became solely a contract by which, on the one hand, the defendant was to do two things, namely: first, build the belt road tracks down to Hender-

son street; and, secondly, operate the belt railroad until the Belt Authorities had provided themselves with an equipment of their own for operating the belt road; and, on the other hand in consideration of the foregoing, was to have the use of the entire belt system.

Had the defendant built the five miles of tracks in place and stead of the Frisco, and the Belt Authorities had sought to deny to defendant any of the rights and privileges which the Frisco would have been entitled to if it had done the work, the defendant would readily have invoked the express terms of the contract as having conferred upon it all the rights and privileges which the Frisco was to have had. And, on the other hand, if the city had sought to compel defendant to do any part of the work after the opposition of the Dock Board had blocked the scheme of the contract by which a belt system was to be constructed of which the defendant was to have the use, the defendant could have answered, with the same readiness, that it had agreed to do the work in consideration of having the use of the contemplated belt system and that inasmuch as the plan embodied in the contract by which the belt system was to be brought into existence, had wholly failed, and there was not to be a belt system, the corresponding obligation to do the work, or any part thereof, had also failed.

Defendant's contract, as thus reduced and simplified, being the same as that of the Frisco (in fact, that the Frisco over again, with defendant standing in place of the Frisco), was purely and simply the embodiment of the scheme by which a belt system was to be constructed through the agency of the railroad and by means of contributions from them; and it fell through and became a dead letter, like that of the Frisco, the moment the opposition of the Dock Board rendered the said scheme impossible of realization.

Another reason why that feature of the contract by which defendant was to have certain rights in consideration of a money payment, could not possibly have any operation after the Frisco had abandoned the idea of building the five miles of tracks or any part thereof, is that, in the nature of things, the existence of a thing is a condition precedent to its being used, or to a grant of its use.

Realizing this, the learned counsel for defendant argue that the city bound herself to bring the tracks into existence; or, in other words, to construct them herself, in case the Frisco did not, so that defendant might have their use; that the Frisco was merely an agent employed by the city to do the work, and that, this agent failing, the city was bound to do the work herself.

We need hardly say that this argument is in the teeth of the express and clear terms of the contract. The provision of the contract is that "Whereas" the Frisco is to construct the five miles of tracks "therefore, under the provisions" of the contract with the Frisco, the use of the tracks is granted to defendant; and that in case the Frisco fails to construct the tracks, then, defendant is to construct them in lieu of paying the \$50,000. Nowhere is there even an intimation that the city will herself do the work. No one dreamed

of such a thing. Such idea is, by the express terms of the ordinance and by its whole spirit, excluded.

The contention of defendant that the contract was divisible, or, in other words, that it contemplated that whatever part of the
565 five miles of tracks the city could furnish a right of way for, should be constructed either by the Frisco or by defendant, and the defendant should have the use of it, finds support in the peculiar phraseology of paragraphs (c) and (d) hereinabove quoted. But that support proves, on close examination, to be merely apparent, and not real.

These clauses are to be understood with the qualification underlying and running through the entire ordinance, that the opposition of the Dock Board shall not be sustained and shall not render impracticable the scheme embodied in the ordinance and forming its whole object and purpose, to construct a complete belt system for the city through the agency of the railroads and by means of contributions from them. In other words, these clauses were intended to provide for the event of the Frisco's failing "without legal excuse" to carry out its contract.

Conclusive evidence of this is found in these clauses themselves.

Thus, it will be observed that they make express reserve of the rights of the city against the Frisco; that they make this reserve repeatedly, as if by superabundant caution. This shows that these clauses presuppose a default on the part of the Frisco, or in other words, a failure "without legal excuse;" for the city would have no rights against the Frisco, and therefore nothing to reserve, and all these superabundant reservations of right would be foolish and absurd, if the failure of the Frisco was with legal excuse, or, in other words, if the Frisco was not in default.

It will be observed, again, that there never was any doubt whatever of the city's ability to furnish all that part of the right of way down to the point at Toledano street, where the belt road would have to enter upon the territory of the Dock Board; and that, consequently, the stipulation of the \$50,000. deposit having to be returned in case the defendant was prevented from building

566 said belt tracks, or any portion of same, on account of the city not furnishing the right of way," could have reference to nothing else than to the inability of the city to furnish the right of way over the Dock Board territory.

It will be observed, further, that the inability of the city to furnish the right of way for a portion of the tracks would not have been for returning the entire \$50,000. deposit, if, as is contended, the contract was to continue in full force and effect for that part of the tracks for which the city would be able to furnish a right of way. If the idea had been that the contract should thus remain in force for part, the retention of a proportional part of the \$50,000. security would have been stipulated. Why return the whole security if the whole contract was not to be at an end. No, the reason why the entire deposit was to be returned in case any portion of the tracks could not be constructed on account of the inability of the city to furnish the right of way, was that the contract was in that event to

be at an end; it was indivisible; it called for the construction of the whole five miles of tracks, or none; if any part of the five miles of tracks could not be constructed on account of the inability of the city to furnish the right of way, then the whole contract fell through and the whole deposit which had been made to secure its execution would have to be returned.

The contingency of the Frisco's having gone on and constructed a part of the five miles of road notwithstanding the success of the Dock Board's opposition, could not possibly have entered the contemplation of the parties; for the very simple reason that the Frisco ordinance did not contemplate, or provide for, such a partial construction; but, on the contrary, was, from its very nature, indivisible. The scheme embodied in that ordinance was the providing the city

with a complete belt system through the agency of the rail-
 567 roads and by means of contributions from them. The reciprocal stipulations were, on the one side, that the city should have from the Frisco, first, the construction of this five miles of road, and then, secondly, the service of the Frisco in operating the belt road until such time as the road should have reached Cluett street and the Belt Authorities should have provided themselves with an equipment of their own for operating the belt; and on the other side, that, in consideration of the foregoing, the Frisco should have the use of the projected belt system. Be it noted that the Frisco was to have the use, not of a part of a belt, or of a disconnected section of railroad strung along the upper river front of the city, but of the "completed belt system." Plainly, under the contract, the city would have been utterly without right to demand of the Frisco the construction of one foot of tracks after the opposition of the Dock Board had nipped in the bud the whole scheme by which a belt system was to be brought into existence of which the Frisco was to have the perpetual use in consideration of the work which it was to do, and the service it was to render, under the contract.

Indeed, had the Frisco gone on and built any portion of the tracks in question, it would have had no right to demand compensation from the city for the work; for the city had not agreed to pay in money for the building of the tracks, or of any part of them, but only by allowing the use of the completed belt. The opposition of the Dock Board blocked the scheme of the Frisco ordinance as effectually and completely as if instead of bearing upon a portion only of the right of way to be furnished by the city it had borne upon the whole. The continuation of the two miles of already constructed tracks down to Toledano street would have reached defendant's river terminals and been beneficial to defendant, but would
 568 have been of no earthly benefit to the Frisco.

Now, since the contingency of the Frisco's having gone on and built a portion of the five miles of belt tracks notwithstanding the success of the opposition of the Dock Board, is an impossible one, such a one, therefore, as the parties could not possibly have contemplated, it necessarily follows that, by the expression, "in the event the N. O. & San Francisco Railroad Co. shall complete only a portion of the tracks," the parties meant to provide for the con-

tingency of the Dock Board's opposition not being sustained and of the Frisco going on and building a portion of the tracks and failing to complete the entire five miles. This was a very improbable contingency; but still a possible one. Under no other could the city have any rights to reserve against the Frisco, and under no other could the Frisco build one foot of tracks with any hope under the contract of ever receiving any consideration therefor.

Defendant's learned counsel argue that the words "without legal excuse" which qualify the event of the Frisco's failure to build the tracks, were added in defendant's interest; and that, such being the case, defendant can waive their benefit; that the thought which dictated them was that it would be fair that any legal excuses which should have availed the Frisco for not doing the work should avail defendant also.

The answer to that argument is, that there would have been no reason for extending to defendant the benefit of such legal excuses as might be personal to the Frisco; indeed, that there would have been no common sense in doing so; and that as to such legal excuses as might not be personal to the Frisco, but common to both defendant and the Frisco, and of which therefore it would be fair to allow the benefit to defendant, there is no suggestion that any existed, or could possibly have existed, except that particular one which
569 at that time was well known and uppermost in the thoughts of the parties,—the opposition of the Dock Board; and that, therefore, the "legal excuse" contemplated by the parties was none other than this same opposition of the Dock Board.

Defendant further contends that even if it were true that the qualifying words "without legal excuse" were added with a view simply to the opposition of the Dock Board, still the Frisco was without legal excuse for not building that part of the five miles of road which did not infringe upon the territory of the Dock Board, namely; that part down to Toledano street; and that the defendant had, in consequence the right, under the contract, to go on and build that part, and have the use of that much of the belt and of the two miles already constructed; and, in that connection the learned counsel for defendant call attention to the fact that defendant's terminals on the river are situated above Toledano street, so that such extension of the belt road would have reached defendant's terminals and furnished all the belt facilities it needed.

That argument had been already fully met in this opinion.

Our conclusion is that the contract with defendant was conditional upon its being possible for the Frisco or defendant to construct the five miles of road, as the initial step in carrying out the scheme of having the entire belt constructed by the railroads and contributions from them; and that when that scheme became impracticable through the Dock Board's opposition to it, the contract came to an end.

Judgment affirmed.

Mr. Justice BREAU: I dissent.

570

Application for Rehearing.

Supreme Court of the State of Louisiana.

No. 17971.

HON. MARTIN BEHRMAN, Mayor of the City of New Orleans,
Appellee,

versus

LOUISIANA RAILWAY AND NAVIGATION COMPANY, Appellant.

To their Honors, the Chief Justice and the Associate Justices of the Supreme Court of the State of Louisiana:

The application of the Louisiana Railway and Navigation Company, defendant-appellant in the above styled and numbered cause, with respect shows:

That your Honorable Court in said cause has handed down a certain decree and judgment herein which contains errors prejudicial to defendant and therefore that a rehearing in said cause should be granted it and among numerous others it shows that the Court erred in the following particulars:—

I.

In overruling its plea of Res Adjudicata.

II.

In overruling its plea of judicial estoppel.

III.

On the Merits.

The Court erred in holding that the language used in the Ordinance requiring the defendant to build the Belt Railroad as an alternative consideration of its grant upon the Frisco "failing without legal excuse to build" is a suspensive condition and dissolved the contract of right.

In attempting to sustain this erroneous position the Court committed numerous errors in statements of both law and fact, all of which will be pointed out and discussed in a brief to be filed in support of this application, but the defendant and applicant now points out the following particular instances in which the Court erred with reference to same:—

(a) In stating the object about which the contract was entered into, in that it holds that said object was exclusively the building of the Belt tracks and not the granting of the right of way over same. And in holding that the granting of the right of way was the consideration of the contract to build the Belt tracks, instead

of holding that the granting of the right of way was the object contracted about and the payment of the \$50,000 in money or the building of the Belt tracks in lieu thereof was the consideration of the contract.

(b) In holding that the consideration of the granting of the right of way could not be performed in part; in other words, that a partial performance was not in contemplation of the parties at the time of entering into the contract.

(c) In holding that the Frisco could not have built part of the tracks.

(d) In holding that your applicant, the Louisiana Railway and Navigation Company, is prevented from building the Belt Railroad by the opposition urged by the Dock Board to the Frisco's right to build and in absolutely ignoring that portion of the ordinance and contract entered into between the City of New Orleans and the Louisiana Railway & Navigation Co. by which the objection of the Dock Board was met and the provision made that the railroad to be constructed at all times be under the control of the Belt Railroad Commission and absolutely in conformity with the permission and consent given for the construction of said Belt Railroad by the Dock Board.

572 (e) In the construction placed upon that portion of the Ordinance with reference to the rights over part of the Belt Railroad.

(f) In holding that the City and Frisco R. R. Co. had placed a certain construction upon the Frisco Ordinance after the decision in the Dock Board case by their inaction and that the defendant had acquiesced in such construction by its failure to act for a period of seventeen months.

IV.

The Court erred in giving effect to Ordinance passed October 4th, 1904, No. 2683, relative to the use of the tracks and approved by the Belt Railroad Commission. In giving effect to this Ordinance the Court has violated Articles 2 and 166 of the Constitution of the State of Louisiana and Section X, Article 1 of the Constitution of the United States. That the said Ordinance of the City Council and resolution of the Dock Board approving same, given effect by the decree herein handed down, impairs the obligation of the contract of your defendant with the City of New Orleans and divests vested rights.

V.

The paragraph X, Section 2, Ordinance No. 1615 N. C. S., commonly known as the Frisco Ordinance, having been construed in the case of Paul Capdevielle, Mayor, v. City of New Orleans and the defendant and applicant herein having contracted with the City of New Orleans with reference to said construction by your Honorable Supreme Court, that said construction became part of the contract, and the Court therefore erred in not applying the same construction

in this case as in that case and is violating the contractual rights of the defendant in placing a different interpretation upon said Ordinance.

VI.

573 The contract existing between plaintiff and defendant is simply a commutative contract imposing reciprocal obligations. The rights of each party are definitely fixed and defined by the Articles of the Civil Code, as well as by the jurisprudence of the State. The Court therefore erred in failing and neglecting to refer to any law of Louisiana authorizing or justifying the decision herein rendered, as required by Article 91 of the Constitution of the State of Louisiana.

Wherefore, your applicant prays that this its application for rehearing be filed; that a period of ten days be granted defendant and applicant in which to file a brief in support of same; that upon final consideration a rehearing be granted and finally that the judgment of the District Court be reversed and that there be judgment in defendant's favor as prayed for in its answer.

(Signed) FOSTER, MILLING, BRIAN & SAAL,
 " WISE, RANDOLPH & RENDALL,
Attorneys for Defendant-Appellant.

(Endorsed:) No. 17,971—Supreme Court of the State of Louisiana—Hon. Martin Behrman, Mayor City of New Orleans, versus Louisiana Ry. & Nav. Co.—Application for Rehearing—Filed November 28-1910—(Signed) John A. Klotz, Deputy Clerk.

Rehearing Refused

Extract from Minutes.

NEW ORLEANS, TUESDAY, January 3, 1911.

The Court was duly opened, pursuant to adjournment.

Present: Their Honors, Joseph A. Breaux, Chief Justice; And Frank A. Monroe, Olivier O. Provosty and Alfred D. Land, Associate Justices.—Absent:—Francis T. Nicholls, Associate Justice.

574 By the COURT:

No. 17971.

MARTIN BEHRMAN, Mayor of the City of New Orleans,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

It is ordered that the rehearing applied for in this case be Refused.

Agreement of Counsel.

Supreme Court of Louisiana.

No. 17971.

MARTIN BEHRMAN, Mayor of the City of New Orleans,

vs.

LOUISIANA RAILWAY & NAVIGATION COMPANY.

It is agreed between counsel that the volume of blue prints filed in the Supreme Court of the State of Louisiana in the above numbered and entitled cause, be omitted from the copy of transcript of appeal returnable to the Supreme Court of the United States upon a writ of error granted the Louisiana Railway and Navigation Company; but in the event either party should desire to use any portion of the evidence embraced in said volume, or should the Supreme Court of the United States desire to examine it, that it may be carried up by either party in the original without further formality.

(Signed)

I. D. MOORE,

City Att'y and Attorney for Martin Behrman, Mayor.

(Signed)

FOSTER, MILLING, BRIAN &
SAAL,*Attorneys for Louisiana Railway and Navigation Co.*

(Endorsed:) No. 17,971. Supreme Court State of Louisiana. Martin Behrman, Mayor, City of New Orleans vs. Louisiana Railway & Navigation Company. Agreement. Filed August 2, 1912. (Signed) Paul E. Mortimer, Clerk.

UNITED STATES OF AMERICA,

State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana, do hereby certify that the foregoing five hundred and seventy-five (575) pages contain a full, true and complete copy of the proceedings had in the Civil District Court, for the Parish of Orleans, in a certain suit wherein Martin Behrman, Mayor of the City of New Orleans was plaintiff, and Louisiana Railway & Navigation Company was defendant; and, also, of all the proceedings had in this Supreme Court on the appeal taken by said Louisiana Railway & Navigation Company, which appeal is now on the files thereof, under No. 17,971.

In testimony whereof I have hereunto set my hand, and affixed the seal of said Court, at the city of New Orleans, this the 2nd day of August, Anno Domini, One thousand, nine hundred and twelve,

and of the Independence of the United States of America, the one hundred and thirty-seventh.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

577 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Joseph A. Breaux, Chief Justice of the Supreme Court of the State of Louisiana, do hereby certify that Paul E. Mortimer is Clerk of the Supreme Court of the State of Louisiana; that the signature of Paul E. Mortimer to the foregoing certificate is in the proper handwriting of him, the said clerk; that said certificate is in due form of law, and that full faith and credit are due to all of his official acts as such.

In testimony whereof, I have hereunto set my hand and seal, at the city of New Orleans, this the 2nd day of August, A. D. one thousand, nine hundred and twelve.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
Chief Justice Supreme Court of the State of Louisiana.

578 UNITED STATES OF AMERICA,
State of Louisiana:

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, Clerk of the Supreme Court of the State of Louisiana hereby certify that the Supreme Court of the State of Louisiana is the highest Court of law in Louisiana, and that the Honorable Joseph A. Breaux is the Chief Justice of said Court and that his signature to the above certificate is genuine.

In witness whereof I haveunto set my hand and the seal of the Court aforesaid, at the city of New Orleans, this the 2nd day of August, A. D. one thousand, nine hundred and twelve.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

579

Supreme Court of Louisiana.

No. 17971.

MARTIN BEHRMAN, Mayor of the City of New Orleans,
versus
LOUISIANA RAILWAY & NAVIGATION COMPANY.

To the Honorable Joseph A. Breaux, Chief Justice of the Supreme Court of the State of Louisiana:

The application of the Louisiana Railway & Navigation Company, defendant and appellant in the above styled and numbered suit, through its attorneys Foster, Milling, Brian & Saal and Wise, Randolph & Rendall, with respect represents:

That it is a citizen of the United States of America and of the State of Louisiana; that in the above entitled matter on the 14th day of November, 1910, a final judgment was rendered against your petitioner by the Supreme Court of the State of Louisiana, that being the highest Court of law or equity in said State; that upon the rendition of said judgment your relators herein made application to the Honorable The Supreme Court of the State of Louisiana for a rehearing which was on the 3rd day of January, 1911 denied.

Your applicant now shows that it is a railroad corporation organized under the laws of the State of Louisiana; that it decided to construct into the City of New Orleans a railroad, on condition that the said City of New Orleans grant to it certain rights and franchises and certain rights of way over the public belt railroad and reservation on the river front so as to reach certain river terminals belonging to your applicant. That the said City of New Orleans passed what was commonly known as Ordinance No. 1997 N. C. S. granting to your applicant, among other rights, a right of way "over the double-track belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson street"

and also a right of way from the public belt railroad into the river terminals above referred to; that this ordinance required
580 the same to be accepted by your applicant and declared that when same was accepted it should become a valid contract between the City of New Orleans and your applicant; that your applicant did accept said ordinance and proceeded to carry out all the obligations under said contract; that prior to the passage of the above ordinance there has been adopted Ordinance No. 147 N. C. S. which said ordinance located and dedicated a right of way for a public belt railroad; that this dedication was approved by the Board of Port Commissioners of the City of New Orleans upon certain terms and conditions; that acting under the terms and conditions expressed in said Ordinance No. 147 N. C. S., as approved by the Board of Port Commissioners of the City of New Orleans, your applicant received its right of way over the public belt railroad and under said

ordinance had a perfect right to operate its cars thereon and to construct the said belt railroad in consideration of the use of same, in the event that the City should so decide and in lieu of paying the \$50,000.00, the price agreed upon; that after the adoption of the said Ordinance No. 1997 N. C. S., granting these rights of way to your applicant as aforesaid, the City of New Orleans amended, reenacted and repealed to a great extent Ordinance No. 147 N. C. S. by what is known as Ordinance No. 2683 N. C. S. and said ordinance repealed all laws or parts of laws in conflict with the same; that this ordinance was on January 18, 1905, approved by the Board of Port Commissioners of the Port of New Orleans and same was approved upon the express condition that neither your applicant nor any other railroad could exercise the right of way granted to it by the said City Council of the City of New Orleans, and the adoption of the Ordinance 2683 N. C. S. and its ratification by the Board of Port Commissioners of the Port of New Orleans repealing the right that your applicant had to a right of way over the public belt railroad and reservation from the upper side of Audubon Park to Henderson street was an attempt to divest your applicant of a vested right; that

581 when your applicant attempted to exercise its rights and perform its obligation under its ordinance and contract, it was enjoined from so doing by an injunction issued out of the Civil District Court for the Parish of Orleans, which suit was appealed to the Honorable Supreme Court of the State of Louisiana and was the suit in which the judgment herein complained of was rendered. That the plaintiff in said cause especially pleaded the subsequent Ordinance No. 2683 N. C. S. as approved by the Board of Port Commissioners of the City of New Orleans as having repealed all the rights which your petitioner had under the original ordinance; that the Honorable the Supreme Court of the State of Louisiana gave effect to the said repealing ordinance and refused to permit your applicant to exercise its rights of way granted to it under said original ordinance, holding that same was in conflict with the authority of the Board of Port Commissioners of the City of New Orleans under said ordinance; that the Honorable the Supreme Court of the State of Louisiana gave effect to this subsequent repealing ordinance and thereby gave effect to a law impairing the obligation of a contract, the contract that existed between your applicant and the City of New Orleans with reference to its rights of way over the public belt railroad and reservation from the upper side of Audubon Park to Henderson street; that this impairing of the obligation of the contract of your applicant is in direct violation of Article I, Section 10, clause 1, of the Constitution of the United States and of the 14th Amendment thereto; and that said judgment works a great and irreparable injury to the rights of your applicant and should be corrected by a judgment of your Honorable Supreme Court. Assignment of errors hereto attached.

Wherefore, applicant prays that a writ of error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Louisiana for the correction of error so complained of and that a transcript of record proceedings and papers in

this case duly authenticated may be sent to the Supreme Court of the United States and on final trial that there be judgment of the Honorable the Supreme Court of the United States reversing the
582 decree of the Supreme Court of the State of Louisiana, and that a judgment be rendered in favor of your applicant as prayed for in its original answer.

FOSTER, MILLING, BRIAN & SAAL,
WISE, RANDOLPH & RENDALL,

Attorneys for Applicant.

The above and foregoing petition having been read and considered, It is ordered that a writ of error issue without supersedeas, as prayed for, on applicant furnishing bond with sufficient security and conditioned according to law, in the sum of One-thousand-five hundred (\$1,500.00) Dollars.

Dated July 22nd, 1912.

JOS. A. BREAUX,
*Chief Justice Supreme Court of
State of Louisiana.*

583 *Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Louisiana.*

The Supreme Court of the State of Louisiana.

LOUISIANA RAILWAY & NAVIGATION COMPANY, Plaintiff in Error,
versus
MARTIN BEHRMAN, Mayor of the City of New Orleans, Defendant
in Error.

Now comes the said Plaintiff in Error and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Louisiana, in the above-entitled matter there is manifest error in this, to-wit:

First. That the Court erred in giving effect to ordinance of the City Council of the City of New Orleans passed October 4, 1904, being No. 2683, relative to the use of the belt tracks, and approved by the Belt Railroad Commission; that in giving effect to this ordinance the Supreme Court of the State of Louisiana has violated the Constitution of the United States and especially Article I, Section 10 thereof, in that it has given effect to a law which impairs the obligation of the contract of your plaintiff in error, and it attempts to divest your plaintiff in error of its vested rights.

Second. That the Court erred in holding as follows in said opinion:

"Our conclusion is that the contract with defendant was conditional upon its being possible for the Frisco or defendant (plaintiff in error) to construct the five miles of road, as the initial step in carrying out the scheme of having the entire Belt constructed by the railroads and contributions from them; and that, when that

scheme became impracticable through the Dock Board's opposition to it, the contract came to an end."

That in thus holding the Supreme Court of the State of Louisiana was giving effect to Ordinance No. 2683, passed October 4, 1904,

584 by the City Council of the City of New Orleans, as the ordinance which was in existence, being Ordinance No. 147 N.

C. S., at the time of the entering into the contract in no manner prevented the entering into the contract embodied in Ordinance No. 1997 N. C. S., which was the contract entered into with the City of New Orleans and the Louisiana Railway and Navigation Company, your plaintiff in error.

Third. The Court erred in the construction that it placed upon the contract under consideration, and violated the common law of the land in its construction and interpretation of the contract as set forth in the reasoning in its opinion, in that it declared that the object or cause of the contract was the consideration and that the real consideration of the contract was the object or cause; it holding that the object of the contract being the construction of a belt railroad for the City of New Orleans, whereas the object was the granting of a right of way over a belt railroad partially constructed and the belt reservation along the City front upon the payment of a monied consideration, or in the alternative, the construction of the railroad in the event of the failure of the person with whom the City had then contracted to build said road.

The Court, after adopting this course of reasoning, fell into numerous other errors in the reasoning set forth in its opinion, a few of which are pointed out as follows:

(a) In holding that the consideration of the granting of the right of way could not be performed in part; in other words, that a partial performance was not in contemplation of the parties at the time of entering into the contract.

(b) In holding that the Frisco could not have built part of the tracks.

(c) In holding that your plaintiff in error, the Louisiana Railway and Navigation Company, is prevented from building the Belt Railroad by the opposition urged by the Dock Board to the Frisco's right to build, and in absolutely ignoring that portion of the ordinance and contract entered into between the City of New Orleans and the Louisiana Railway and Navigation Company by
585 which the objection of the Dock Board was met and the provision made that the railroad to be constructed at all times be under the control of the Belt Railroad Commission, and absolutely in conformity with the permission and consent given for the construction of said Belt Railroad by the Dock Board.

(d) In the construction placed upon that portion of the ordinance with reference to the rights over part of the Belt Railroad.

(e) In holding that the City and Frisco Railroad Company had placed a certain construction upon the Frisco ordinance after the decision in the Dock Board case by their inaction, and that the Louisiana Railway and Navigation Company, your plaintiff in error,

had acquiesced in such construction by its failure to act for a period of seventeen months.

Fourth. The Court further erred as will hereinafter appear.

Paragraph 10 of Section 2, Ordinance 1615 N. C. S., commonly known as the "Frisco Ordinance," having been considered in the case of Paul Capdevielle, Mayor, v. City of New Orleans, and your plaintiff in error herein having contracted with the City of New Orleans with reference to said construction by the Honorable Supreme Court of the State of Louisiana placed upon said ordinance, said construction became part of the contract, and the Court therefore erred in not applying the same construction in this case as in that case, and is violating the contractual rights of plaintiff in error in placing a different interpretation upon said contract; and that by refusing to apply the law of the land in the interpretation and construction of said contract, the said Court is refusing to your plaintiff in error the equal protection of the law, which is violative of the Constitution of the United States.

FOSTER, MILLING, BRIAN & SAUL,
WISE, RANDOLPH & RENDALL,

Attorneys for Plaintiff in Error.

M. J. FOSTER.

[Endorsed:] No. 17,971. Supreme Court Louisiana. Martin Behrman, Mayor of the City of New Orleans, vs. Louisiana Railway & Navigation Co. Petition for writ of error & order granting writ. Assignment of Errors. Filed June 8, 1912. Paul E. Mortimer, Clerk.

586

Copy of Bond for Writ of Error.

Supreme Court, State of Louisiana.

No. 17971.

LOUISIANA RAILWAY & NAVIGATION COMPANY, Plaintiff-in-Error,
versus
MARTIN BEHRMAN, Mayor of the City of New Orleans, Defendant-in-Error.

Know all men by these presents that we, Louisiana Railway and Navigation Company, as principal, and William Edenborn, as surety, are held and firmly bound unto Martin Behrman, mayor of the city of New Orleans, and the said city of New Orleans, State of Louisiana, in the sum of One Thousand Five Hundred (\$1,500.00) Dollars, to be paid to the said obligees, their successors, representatives, and assigns; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 22d day of July, A. D. 1912.

Whereas the above-named Louisiana Railway & Navigation Company, plaintiff in error, hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Supreme Court of the State of Louisiana.

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

[SEAL.]

LOUISIANA RAILWAY & NAVIGATION COMPANY,

(Signed)

WM. EDENBORN, *Pres't.*

(Signed)

WM. EDENBORN, *Surety.*

Signed, sealed, and delivered in the presence of

STATE OF LOUISIANA,

Parish of Orleans:

587 On this the 22nd day of July, before me, the undersigned authority, personally came and appeared William Edenborn, to me well known to be the person who executed the foregoing bond for and on behalf of the Louisiana Railway & Navigation Company, and who being by me first duly sworn, declared and acknowledged that he is the President of the said Company and duly authorized to execute the said bond, and that he executed the same as the free act and deed of the said Louisiana Railway & Navigation Company; and who further deposes and says that he is the surety on the within bond; that he resides in the City of New Orleans, State of Louisiana, and is well worth the full sum of One Thousand Five Hundred (\$1,500.00) Dollars over and above his debts and liabilities and property exempt from execution.

(Signed)

WM. EDENBORN.

Sworn to and subscribed before me on this the 22nd day of July, A. D. 1912.

[SEAL.]

(Signed)

ALEXIS BRIAN,

Notary Public.

I hereby approve the foregoing bond and the surety thereon.

Dated this 22d day of July, 1912.

(Signed)

JOS. A. BREAUX,

*Chief Justice of the Supreme Court
of the State of Louisiana.*

(Endorsed:) No. 17,971—Supreme Court of Louisiana—Louisiana Railway & Navigation Company, Plaintiff-in-error, vs. Martin Behrman, Mayor of the City of New Orleans, defendant-in-error—Bond—Filed July 22, 1912,—(Signed) Paul E. Mortimer, Clerk.

588 UNITED STATES OF AMERICA, *vs.*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Louisiana, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Louisiana Railway & Navigation Company, plaintiff in error, and Martin Behrman, Mayor of the City of New Orleans, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of *the* clause

589 of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Louisiana Railway & Navigation Company, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Edward D. White, Chief Justice of the said Supreme Court, the 22nd day of July, in the year of our Lord one thousand nine hundred and twelve.

[Seal U. S. District Court for the Eastern District of La.,
N. O. Div.]

H. J. CARTER,

*Clerk of the District Court of the United States
for the Eastern District of Louisiana.*

Allowed by:

JOS. A. BREAUX,

Chief Justice Supreme Court of Louisiana.

New Orleans, July 22, 1912.

(Endorsed:) No. 17,971. Louisiana Railway & Navigation Company, plaintiff in error versus Martin Behrman, Mayor of the City of New Orleans, defendant in error. Writ of Error. Filed July 22, 1912 Paul E. Mortimer, Clerk.

590

Certificate of Lodgment.

Supreme Court of the State of Louisiana.

I, Paul E. Mortimer, clerk of the Supreme Court of the State of Louisiana, do hereby certify that there was lodged with me as such clerk, in the matter of Louisiana Railway & Navigation Company, plaintiff-in-error vs. Martin Behrmann, Mayor of the city of New Orleans, defendant-in-error:

First. On June 8th, the petition for writ of error and assignment of errors.

Second. On July 22nd., one original writ of error, incorporated in this transcript; and two copies of the writ of error—one for the defendant, and one to file in my office.

Third. On July 22nd, the original bond of which a copy is herein set forth.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in New Orleans, Louisiana, this second day of August, A. D. 1912.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk of the Supreme Court of Louisiana.

591 THE UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

The President of the United States to Martin Behrman, Mayor of the City of New Orleans, and the City of New Orleans, State of Louisiana, by and through the said Martin Behrman, Mayor, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington, within thirty days from the date hereof pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Louisiana at New Orleans, wherein the Louisiana Railway & Navigation Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 22d day of July in the year of our Lord one thousand nine hundred and twelve.

[Seal Supreme Court of the State of Louisiana.]

JOS. A. BREAUX,
*Chief Justice of the Supreme Court
of the State of Louisiana.*

[Endorsed:] Supreme Court of the State of Louisiana. No. 17,971. Louisiana Railway & Navigation Company, plaintiff-in-error, vs. Martin Behrman, mayor of the City of New Orleans, defendant-in-error. Citation. *Sheriff's return.* Filed July 22, 1912. Paul E. Mortimer, Clerk.

NEW ORLEANS, July 23rd, 1912.

I, City Att'y City of New Orleans and as such Attorney of Record for the defendant-in-error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

D. MOORE,
City Attorney, for the Defendant-in-error.

592 UNITED STATES OF AMERICA:

Supreme Court of the State of Louisiana.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Louisiana, in the city of New Orleans, this 2nd day of August, 1912.

[Seal Supreme Court of the State of Louisiana.]

PAUL E. MORTIMER,
Clerk Supreme Court of Louisiana.

Endorsed on cover: File No. 23,332. Louisiana Supreme Court. Term No. 329. Louisiana Railway & Navigation Company, plaintiff in error, vs. Martin Behrman, Mayor of the City of New Orleans. Filed August 12th, 1912. File No. 23,332.

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 329.

LOUISIANA RAILWAY AND NAVIGATION CO.,

PLAINTIFF IN ERROR,

VERSUS

MARTIN BEHRMAN, MAYOR OF THE CITY OF
NEW ORLEANS,

DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Louisiana.

BRIEF OF DEFENDANT IN ERROR ON MOTION TO DISMISS
WRIT OF ERROR.

The City of New Orleans, defendant in error, has moved to
dismiss the writ of error herein on the ground that this

Court is without jurisdiction to review the decision of the Supreme Court of the State of Louisiana in this cause; because the Supreme Court of the State of Louisiana did not decide, nor was it necessary to the disposition of the case that it should decide, any Federal question.

Although the plaintiff has averred, in his assignment of errors:

“That the Court erred in giving effect to ordinance of the City Council of the City of New Orleans passed October 4, 1904, being No. 2683, relative to the use of the belt tracks, and approved by the Belt Railroad Commission; that in giving effect to this ordinance the Supreme Court of the State of Louisiana has violated the Constitution of the United States and especially Article I, Section 10 thereof, in that it has given effect to a law which impairs the obligation of the contract of your plaintiff in error, and it attempts to divest your plaintiff in error of its vested rights” (Tr., p. 446. *print*)—

and notwithstanding the other assignments of error, which are all based upon the proposition that the Supreme Court of Louisiana gave effect to Ordinance No. 2683, N. C. S.—it is none the less a fact that the Court did not give effect to said Ordinance No. 2683, N. C. S., in any manner whatsoever, nor was the consideration of that ordinance at all necessary to the determination of the case, nor did the Court deem its consideration necessary; but, on the contrary, the Court proceeded to decide the case wholly without reference to the said ordinance No. 2683, N. C. S. It based its decision exclusively upon the ground that the contract of the plaintiff in error (*Ordinance No. 1997, N. C. S.*), the execution of which defendant in error sought to restrain by injunction, and under which plaintiff in error asserts its rights, was de-

pendent for its execution upon suspensive conditions that did not eventuate, and hence plaintiff in error could not exercise the franchise claimed under said ordinance. This ground is wholly independent of any Federal question, and broad enough to dispose of the case without reference to any Federal question; and, furthermore, it is a ground which would, necessarily, have had to be determined before the question of the impairment of the obligation of the contract of plaintiff in error could have been considered at all, and would have been equally controlling if the ordinance complained of as impairing the obligation of the contract had never been passed. All this will clearly appear from a simple statement of the case.

The character of the case may be stated thus:

The City of New Orleans sought to enjoin the Louisiana Railway and Navigation Company from in any manner attempting to execute Ordinance No. 1997, N. C. S., in so far as it purported to grant to said Company any rights of way or privileges to construct, maintain and operate tracks over and along a certain public belt railroad reservation, or to operate cars, locomotives and other equipment over and along certain public belt railroad tracks; from assigning or hypothecating such rights or privileges; and from impeding or attempting to prevent the construction by the City of New Orleans of public belt tracks, or the operation of public belt locomotives, cars and equipment over said public belt tracks; and to have said Ordinance No. 1997, N. C. S., in so far as it purported to grant to said Company any rights of way or privileges to construct, maintain and operate railroad tracks on said public belt reservation, or to operate locomotives, cars and equipment over said public belt tracks, declared *ultra vires*, null, void and of no effect.

The injunction issued, and was properly served. The defendant, plaintiff in error, appeared, and, after answering generally to the petition, set up in error that

“if the Court attempts to attach weight to same (*Ordinance No. 2683, N. C. S., adopted October 4, 1904*), or in any manner to construe the same so as to affect the right of your defendant, then it is giving effect to a law which impairs the obligation of the contract of your defendant (*Ordinance No. 1997, N. C. S., adopted September 1, 1903*), it attempts to divest vested rights and is in violation of * * * Section 10, Article 1 of the Constitution of the United States. Your defendant now especially pleads the unconstitutionality of said Ordinance and such interpretation as being repugnant to * * * Section 10, Article 1, of the Constitution of the United States.” (*Tr., p. 30, print.*)

After due proceedings there was judgment perpetuating the injunction. An appeal was taken to the Supreme Court of the State of Louisiana, and the judgment was affirmed. The defendant, the Louisiana Railway and Navigation Company, now seeks to have this judgment reviewed upon the writ of error herein directed to the Supreme Court of the State of Louisiana.

The salient facts of the case, *as shown by the record and recited in the opinion of the Supreme Court of the State of Louisiana*, are as follows:

The authorities of the City of New Orleans conceived the plan of a public belt railroad system that should pass along the river front and encircle the city, connecting all the trunk lines of railroad, and reaching by means of switches every wharf, freight depot, and important industry. Unfortunately the city had not the funds wherewith to carry out the

project. A beginning was made, however, by entering into a contract with the Illinois Central Railroad under which, in consideration of certain concessions that railroad constructed two miles of line along the river front, from the upper limit of the city down to the upper boundary of Audubon Park. The city then passed an ordinance creating a Board of Commissioners to have charge and control of the proposed Belt Railroad. The ordinance bears date of August 7, 1900, and is No. 147 N. C. S.

About two years later, February 10, 1903, there was passed an ordinance known as the Frisco ordinance, or Ordinance No. 1615 N. C. S. This ordinance embodied a scheme for the continuation of the construction of the projected belt railroad of which the Illinois Central had already constructed two miles. The scheme was that the New Orleans & San Francisco Railroad—or the Frisco, as popularly called—should construct, at its own expense, five miles of road, continuing down to Henderson Street the two miles already constructed by the Illinois Central Railroad, in consideration of which said Frisco Railroad should have the use of the belt, with the right to operate thereon its own locomotives, cars and equipment; that an account should be kept of this expense; and that every railroad, on contributing an amount at least equal, should have the right to use the belt in the same way. The ordinance made careful provision for the mode of operating the belt, both while in course of construction and when constructed.

This ordinance was passed over the veto of the then Mayor of the City, Mr. Capdevielle, who at once brought suit to annul it.

At certain places along the river front the Belt Railroad

would have to pass through territory within the limits of the port of the City, under the jurisdiction of the Board of Commissioners of the port, and permission for it to pass had been previously obtained from said Board; but the permission had been granted exclusively to the City of New Orleans and only under the express condition that it should

“remain in force only so long as the Public Belt Railroad is operated and controlled by the Board of Commissioners of the Public Belt Railroad in accordance with the provisions of the ordinance creating that Commission;”

which ordinance (*No. 147, N. C. S., adopted August 7, 1900*), provided that

“the management and control of the Public Belt Railroad shall be separate and distinct from that of any railroad entering New Orleans, and shall remain forever the property of the City of New Orleans, and no employee, director or officer of any State or interstate railroad shall be employed by or allowed to act as director, commissioner or manager of the Public Belt Railroad.”

Now, whereas, the said Frisco ordinance (*No. 1615, N. C. S.*) allowed the railroads to participate in considerable degree in the operating of the belt, the Board of Commissioners of the Port, or Dock Board, considered this to be a violation of the express condition upon which alone it had granted permission to the belt road to pass through the territory of the port, and, therefore, it promptly brought suit to enjoin the Frisco from carrying out the ordinance

“in so far as it authorizes the construction and maintenance of a railroad on the wharves or landings of the port of New Orleans.”

The said suits, the Capdeville suit and this Dock Board

suit, reached the Supreme Court of Louisiana. By two judgments of said Court—one of which, that in the Capdeville suit became final on June 3, 1903—and the other of which, that in the Dock Board suit became final on June 24, 1904—the demand of the Capdevielle suit was rejected and that of the Dock Board suit maintained. (*Capdevielle, Mayor of New Orleans vs. New Orleans and S. F. R. R. Co.*, 110 La. 904; 34 So. 868; *Board of Commissioners vs. New Orleans and S. F. R. R. Co.*, 112 La. 1011; 36 So. 837.)

Over two months after the termination of the Capdevielle suit, but while the Dock Board suit was still pending, the ordinance which forms the subject-matter of the present suit (*No. 1997, N. C. S., dated September 4, 1903*), was adopted. This ordinance grants to the defendant the use of the belt road from the upper city limits to Henderson Street on paying \$50,000, upon the condition that the five miles of said road, from the upper boundary of Audubon Park down to Henderson Street, or at least a portion thereof, should be built by the Frisco; and provided that, in case the Frisco fails *without legal excuse* to construct the five miles of road called for by its contract, the defendant railroad is to construct the same on the same terms and conditions, succeeding to all the rights and obligations of the Frisco, and its doing the work is to be in lieu of paying the \$50,000; that as security for the performance of this obligation the defendant railroad is to deposit in the hands of the fiscal agent of the City on July 1, 1904, good bonds or other securities to the amount of \$50,000. In the event the Frisco should construct only a portion of the five miles of road the defendant railroad is to have the use of the two miles constructed and of whatever portion of the five miles might be thus constructed, and instead of paying the full \$50,000, is to make payment in proportion.

The defendant made formal acceptance of the ordinance, thereby converting it into a contract.

When the adverse decision of the Dock Board suit was rendered, the Frisco and the City looked upon it as having put an end to the scheme by which the construction of the belt road was to be effected by means of contributions from the railroads; and the defendant appeared to have taken the same view, for it remained quiescent, and gave no sign of its intending to take any further interest in the matter, for seventeen months, until November 10, 1905. It then deposited \$50,000 of bonds with one of the fiscal agents of the City as a guarantee for carrying out the contract, and notified the City of the deposit having been made.

Following defendant's revival of interest in the ordinance, as shown by the making of the fifty thousand dollars deposit, fruitless conference took place between defendant's officials and the city authorities; and then, on the 16th of May, 1906, the defendant (plaintiff in error) undertook to begin the construction of the five miles of road, and the present suit was promptly instituted by the City of New Orleans enjoining defendant (plaintiff in error) from doing so.

The grounds of injunction were:

FIRST—That the contract with the defendant is null, because it divests the people of the city of their property without due process of law, and impairs the obligation of the City's contract with the Illinois Central, under which the two miles of track were constructed; and because it stipulates something impossible, namely, the construction upon the territory of the Dock Board of a belt road which should be in some degree under the control of the railroads.

SECOND—That the contract with defendant, if ever valid, has terminated, because it was subject to suspensive conditions which can never be accomplished; that as to that part of the contract by which defendant was to have the use of the belt road down to Henderson Street, on paying \$50,000, the condition was that the five miles of said road from the upper boundary of Audubon Park down to Henderson Street, or at least a portion thereof, should be built by the Frisco; that as to that part of the contract by which the defendant was to be under the obligation to build said five miles of road in case the Frisco failed to do so, the condition was that the failure of the Frisco to do the work should have been without legal excuse; that as to the contract as a whole the condition was that the defendant company should deposit with the fiscal agent of the City on April 1, 1904, \$50,000 of bonds as a security for the fulfillment of the contract; that these conditions can never be accomplished because the Frisco has given up all idea of building said five miles of road and has done so with good legal excuse, and the 1st day of July, 1904, has been suffered by defendant to pass without any deposit having been made.

The further allegation is made that the Board of Commissioners of the belt railroad had already begun the construction of the belt road, under the provisions of the ordinance passed to that effect, when the defendant, on May 16, 1906, made the attempt to begin the work.

The Supreme Court of Louisiana in passing upon the case, as will be seen by its opinion, printed in full in the record (*Tr.*, pp. 416, *et seq.*, *print*; 127 *La.* 775), disposed of the City of New Orleans' first grounds of injunction, those relating to the nullity of the contract, because *ultra vires*, and

because divesting the people of the City of New Orleans of their property without due process of law, and impairing the obligation of the contract with the Illinois Central, by saying that these grounds were fully considered by the Court in the Capdevielle case *supra*—holding them not to be well founded.

The Court also held that the City's allegation that the Belt Railroad Board had already begun the construction of the five miles of road was not supported by the evidence; and that the question of whether the deposit of \$50,000 of bonds was or not made within the limit of time allowed for making it, was unimportant.

Proceeding, however, to further consider the case, the Court said (*Tr.*, p. 429, *print*):

"We agree with the plaintiff (the defendant in error) however, that the contract was subject to a suspensive condition, and that this condition had become impossible of realization, and the contract had, in consequence, fallen through, when the plaintiff made its attempt to begin work and the injunction was taken.

"The two ordinances, that in favor of the Frisco and that in favor of the defendant, embody a scheme for the construction of the Belt Railroad system through the agency of the railroads for whose use the same was intended, and by means of contributions from them.

"In the first of these ordinances the City said to the Frisco: 'I have already two miles of my projected belt system constructed. You construct, at your expense, but under the supervision of the Board of Commissioners of my belt railroad, five miles more. My said Board will keep an account of your expenditure in this work, and every railroad desiring to use my belt system will be required to contribute a sum equal to your said expendi-

ture to a fund which shall be used exclusively towards completing my said belt system. In consideration of your doing this, you shall have a right of way over my said belt system for your locomotives, trains and cars; and until the belt shall have sufficiently approached completion to justify my having an equipment of my own to operate it, you shall be my agent in operating it, and in doing so you shall observe the following regulations,' etc.

"In the second of the ordinances the City said to defendant: 'With a view of carrying out my project of constructing a belt railroad system I have made arrangements with the Frisco to prolong five miles lower down the two miles of tracks already constructed. I will give you a right of way over these seven miles of tracks for your locomotives, trains and cars for \$50,000; and in case the Frisco does not build said five miles of tracks, then, I make with you for the construction of same the same arrangement precisely which I have made with the Frisco. I make you this proposition only in the event the failure of the Frisco to build said tracks is without legal excuse—that is to say, that the opposition which the Dock Board is making to the carrying out of my arrangement with the Frisco is not sustained by the Court; for, as a matter of course, that opposition would be as fatal to the present proposed arrangement with you as to the same arrangement with the Frisco. Such a thing is possible, however, as that the Frisco should default with its contract after having partially executed it by constructing a part of the five miles of road; in that event you will pay for the use of the constructed part of my belt road a proportional part of the \$50,000, and you will continue with the construction of the five miles of tracks on the terms and conditions agreed on.' * * *

"Defendant accepted the ordinance as passed—accepted the proposition as made; hence, its contract has no greater scope than the ordinance, and is not different from it.

"That the foregoing is the proposition contained in the ordinance is, we think, perfectly plain from the mere perusal of the ordinance. * * *

"Our conclusion is that the contract with defendant was conditional upon its being possible for the Frisco or defendant to construct the five miles of road, as the initial step in carrying out the scheme of having the entire belt constructed by the railroads and contributions from them; and that when the scheme became impracticable through the Dock Board's opposition to it, the contract came to an end.

"Judgment affirmed."

The opinion of the Supreme Court of the State of Louisiana makes no reference whatsoever to Ordinance No. 2683, N. C. S., adopted October 4, 1904 (subsequent to the contract of the plaintiff in error, viz., Ordinance No. 1997, N. C. S., adopted September 1, 1903), except to recite, incidentally, and not as a point for decision, that

"the city had, in the meantime, in October, 1904, thirteen months before the date of the deposit, passed an ordinance reorganizing the Belt Road Commission, and making adequate financial and other provision for the construction and operation of the belt, and repealing all conflicting ordinances. Against that action on the part of the city defendant had made no protest; although defendant could not but have known of it, since the measure had attracted a great deal of attention; in fact, had been looked upon as so important as to constitute an epoch in the industrial life of the city, and had been celebrated as such by a mass meeting at which speeches were made."
(*Tr.*, p. 426, *print.*)

The Supreme Court of the State of Louisiana did not decide whether or not Ordinance No. 2683, N. C. S., impaired the obligation of the contract of plaintiff in error (*Ordinance No.*

1997, N. C. S.), nor did it interpret said Ordinance No. 2683, N. C. S., in any particular. Such a decision and such an interpretation were unnecessary to the disposition of the case. Nor did the Supreme Court of Louisiana decide any Federal question propounded by plaintiff in error; nor was it necessary that it should decide any such Federal question. It decided wholly and exclusively that the contract of plaintiff in error was subject to suspensive conditions, and that such conditions having become impossible of realization, the contract had fallen through and come to an end. This ground (which is supported by the jurisprudence of the State of Louisiana, and by the decision of this Honorable Court in *New Orleans v. Texas and Pacific Railway Company*, 171 U. S. 312), is broad enough to dispose of the whole case, and renders the decision of any Federal question absolutely unnecessary.

Therefore, this Honorable Court is without jurisdiction to review the decision of the Supreme Court of the State of Louisiana in this cause.

This conclusion is sustained by numerous authorities, from a few of which we quote:

"Where the state court bases its judgment entirely upon the effect and construction of the statutes claimed to create the contract, and upon grounds which would have been equally controlling if the later acts had not been passed, the United States Supreme Court cannot review the judgment."

125 U. S. 39.

"The decision of a state court that an alleged contract never existed because of the want of compliance with a state statute, whereupon judgment is given wholly without reference to a subsequent statute which is alleged to

have impaired the obligation of the contract, does not involve a Federal question."

163 *U. S.* 207.

"Before the Supreme Court of the United States can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment."

142 *U. S.* 79.

"The state court cannot be held to have decided a question as to the impairment of the obligation of a contract unless it has given effect to subsequent state legislation claimed to have accomplished that result."

121 *U. S.* 388.

"A decision of a state court upholding a municipal tax on a bridge on the ground that the bridge company, by accepting its franchise from the city, voluntarily agreed that the bridge should be subject to taxation, rests upon a ground broad enough to dispose of the case without reference to the Federal question involved in the contention that the tax ordinances of the city impaired the obligations of its charter from the state, and of a contract which the bridge company entered into with a railroad company for the maintenance and operation of the bridge."

141 *U. S.* 679.

"Where the state court rested its judgment enforcing the payment of taxes on railroad property, not upon the ground that such property was rendered taxable by any law passed subsequent to the company's charter, but that under the terms of the charter itself such property was taxable, the Supreme Court of the United States is without jurisdiction to review that judgment."

142 *U. S.* 282.

"Appellate jurisdiction by the United States Supreme Court cannot be sustained where the decision of the state court appealed from was made upon rules of general jurisprudence, or other grounds broad enough in themselves to sustain the judgment without considering a Federal question appearing in the case, but not necessarily involved."

142 *U. S.* 79.

"A decision of a state court on an independent ground broad enough to sustain the judgment cannot be reviewed by the Supreme Court of the United States on the ground that a Federal question was involved."

160 *U. S.* 556.

"Where the Supreme Court of a state decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question."

150 *U. S.* 633; 124 *U. S.* 394; 132 *U. S.* 554; 133 *U. S.* 380; 135 *U. S.* 244; 138 *U. S.* 397; 139 *U. S.* 288; 141 *U. S.* 679; 142 *U. S.* 73; 142 *U. S.* 636; 144 *U. S.* 130; 144 *U. S.* 323; 146 *U. S.* 458; 150 *U. S.* 361; 152 *U. S.* 689.

"The determination by a state court of a Federal question adversely to plaintiff in error will not sustain the jurisdiction of the Supreme Court of the United States, if another question, not Federal, was also raised and decided against him and the decision thereof is sufficient, notwithstanding the Federal question, to sustain the judgment."

171 *U. S.* 38; 163 *U. S.* 207; 165 *U. S.* 188; 168 *U. S.* 674; 171 *U. S.* 641; 172 *U. S.* 465; 124 *U. S.* 394; 163 *U. S.* 325.

"It is not enough, to give this court jurisdiction over the judgment of a state court, for the record to show that a Federal question was argued or presented to that court for decision. It must appear that its decision was necessary to the determination of the case, and that it was actually decided, or that judgment could not have been given without deciding it."

21 *Wall.* 636; 91 *U. S.* 594; 92 *U. S.* 327; 98 *U. S.* 140; 120 *U. S.* 103; 129 *U. S.* 178; 121 *U. S.* 282; 127 *U. S.* 216; 134 *U. S.* 607; 137 *U. S.* 300; 138 *U. S.* 635; 139 *U. S.* 293; 151 *U. S.* 389.

"To give this court appellate jurisdiction under §25 of the judiciary act (or *U. S. Rev. Stat.* §709, *U. S. Comp. Stat.* 1901, p. 575), two things should have occurred and be apparent in the record; first, that some of the questions stated in the section did arise in the court below; and, second, that a decision was actually made thereon by the same court in the manner required by the section."

5 *Howe* 317; 12 *Pct.* 66; 10 *Pct.* 368; 111 *U. S.* 200.

"Even though it does not conclusively appear to be the fact, yet, where the state court may properly have disposed of the case without deciding the Federal question, its judgment is not reviewable in the Supreme Court of the United States."

13 *Wall.* 257.

"When the state court gives no effect to a subsequent state law, and decides on grounds independent of it that the right claimed was not conferred by the contract, the United States Supreme Court has no jurisdiction."


125 *U. S.* 18; 143 *U. S.* 371; 151 *U. S.* 666; 163 *U. S.* 216.

"Where the judgment of a state court might have been based either upon a state law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did base it upon the other ground, the Supreme Court will not take jurisdiction, even though it thinks the state court decided erroneously."

13 *Wall.* 257; 14 *Wall.* 26; 98 *U. S.* 141; 125 *U. S.* 29; 127 *U. S.* 234; 134 *U. S.* 614; 137 *U. S.* 307; 150 *U. S.* 366; 163 *U. S.* 69; 172 *U. S.* 100.

Defendant in error respectfully asks that the writ of error be dismissed.

Respectfully submitted,


~~J. D. MOORE~~, *City Attorney.*

Counsel for Defendant in Error.

APRIL, 1914.



Office Supreme Court, U. S.

FILED

MAY 4 1914

JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 49

LOUISIANA RAILWAY AND NAVIGATION COM-
PANY, PLAINTIFF IN ERROR,

vs.

MARTIN BEHRMAN, MAYOR OF THE CITY OF NEW
ORLEANS, DEFENDANT IN ERROR.

Comes now the City of New Orleans, defendant in error, by its counsel appearing in that behalf, and moves the court to dismiss the writ of error herein for want of jurisdiction, because the judgment or decree sought to be reviewed is the judgment or decree of the Supreme Court of one of the United States, to wit, the Supreme Court of the State of Louisiana, and no Federal question is involved in or was decided by said court in said cause. The decision in said cause is given wholly without reference to Ordinance No. 2683, N. C. S., of the City of New Orleans, which ordinance is alleged by the plaintiff in error to impair the obligation of its contract (Ordinance No. 1997, N. C. S.), the Supreme Court of the State of Louisiana basing its decision solely

upon the ground that the contract of plaintiff in error (Ordinance No. 1997, N. C. S.) was dependent for its execution upon suspensive conditions that did not eventuate, and that hence the defendant (plaintiff in error) could not exercise the franchise claimed under said contract, the said ground for decision being not only independent of any Federal question and broad enough to dispose of the case without reference to any Federal question, but one which would necessarily have had to be determined before any question of the impairment of the obligation of said contract by subsequent legislation could have been considered at all, and which would have been equally controlling if the ordinance complained of as impairing the obligation of the contract had never been passed.

I. D. MOORE,
City Attorney,
Counsel for Defendant in Error.

[25152]

No.49

Office Supreme Court, U. S.

FILED

OCT 27 1914

JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

[REDACTED]

LOUISIANA RAILWAY AND NAVIGATION CO.,
PLAINTIFF IN ERROR,
VERSUS

MARTIN BEHRMAN, MAYOR OF THE CITY OF
NEW ORLEANS,
DEFENDANT IN ERROR,

In Error to the Supreme Court of the State of Louisiana.

BRIEF OF DEFENDANT IN ERROR.

I. D. MOORE, *City Attorney,*
Counsel for Defendant in Error.

October 1914.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM. 1913.

No. 329.

LOUISIANA RAILWAY AND NAVIGATION CO.,
PLAINTIFF IN ERROR,
VERSUS

MARTIN BEHRMAN, MAYOR OF THE CITY OF
NEW ORLEANS,
DEFENDANT IN ERROR,

In Error to the Supreme Court of the State of Louisiana.

BRIEF OF DEFENDANT IN ERROR.

MOTION TO DISMISS.

The City of New Orleans, defendant in error, has moved to dismiss the writ of error herein on the ground that this Court is without jurisdiction to review the decision of the Supreme Court of the State of Louisiana in this cause, because the Supreme Court of the State of Louisiana did not decide, nor was it necessary to the disposition of the case that it should decide, any Federal question.

Although the plaintiff has averred, in his assignment of errors:

“That the Court erred in giving effect to ordinance of the City Council of the City of New Orleans passed October 4, 1904, being No. 2683, relative to the use of the Belt tracks, and approved by the Belt Railroad Commission; that in giving effect to this ordinance the Supreme Court of the State of Louisiana has violated the Constitution of the United States and especially Article I, Section 10 thereof, in that it has given effect to a law which impairs the obligation of the contract of your plaintiff in error, and it attempts to divest your plaintiff in error of its vested rights” (Tr., p. 446, *print*)—

and notwithstanding the other assignments of error, which are all based upon the proposition that the Supreme Court of Louisiana gave effect to Ordinance No. 2683, N. C. S.—it is none the less a fact that the Court did not give effect to said Ordinance No. 2683, N. C. S., in any manner whatsoever, nor was the consideration of that ordinance at all necessary to the determination of the case, nor did the Court deem its consideration necessary; but, on the contrary, the Court proceeded to decide the case wholly without reference to the said ordinance No. 2683, N. C. S. It based its decision exclusively upon the ground that the contract of the plaintiff in error (*Ordinance No. 1997, N. C. S.*), the execution of which defendant in error sought to restrain by injunction, and under which plaintiff in error asserts its rights, was dependent for its execution upon suspensive conditions that did not eventuate, and hence plaintiff in error could not exercise the franchise claimed under said ordinance. This ground is wholly independent of any Federal question, and broad enough to dispose of the case without reference to

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any Federal question; and, furthermore, it is a ground which would, necessarily, have had to be determined before the question of the impairment of the obligation of the contract of plaintiff in error could have been considered at all, and would have been equally controlling if the ordinance complained of as impairing the obligation of the contract had never been passed. All this will clearly appear from a simple statement of the case.

CHARACTER OF THE CASE.

The character of the case may be stated thus:

The City of New Orleans sought to enjoin the Louisiana Railway and Navigation Company from in any manner attempting to execute Ordinance No. 1997, N. C. S., in so far as it purported to grant to said company any rights of way or privileges to construct, maintain and operate tracks over and along a certain Public Belt Railroad reservation, or to operate cars, locomotives and other equipment over and along certain Public Belt Railroad tracks; from assigning or hypothecating such rights or privileges, and from impeding or attempting to prevent the construction by the City of New Orleans of Public Belt tracks, or the operation of Public Belt locomotives, cars and equipment over said Public Belt tracks, and to have said Ordinance No. 1997, N. C. S., in so far as it purported to grant to said company any rights of way or privileges to construct, maintain and operate railroad tracks on said Public Belt reservation, or to operate locomotives, cars and equipment over said Public Belt tracks, declared *ultra vires*, null, void and of no effect.

The injunction issued, and was properly served. The defendant, plaintiff in error, appeared, and, after answering generally to the petition, set up in error that

"if the Court attempts to attach weight to same (Ordinance No. 2683, N. C. S., adopted October 4, 1904),

or in any manner to construe the same so as to affect the right of your defendant, then it is giving effect to a law which impairs the obligation of the contract of your defendant (*Ordinance No. 1997, N. C. S., adopted September 1, 1903*), it attempts to divest vested rights and is in violation of * * * Section 10, Article 1, of the Constitution of the United States. Your defendant now especially pleads the unconstitutionality of said ordinance and such interpretation as being repugnant to * * * Section 10, Article 1, of the Constitution of the United States." (*Tr., p. 30, print.*)

After due proceedings there was judgment perpetuating the injunction. An appeal was taken to the Supreme Court of the State of Louisiana, and the judgment was affirmed. The defendant, the Louisiana Railway and Navigation Company, now seeks to have this judgment reviewed upon the writ of error herein directed to the Supreme Court of the State of Louisiana.

SALIENT FACTS OF THE CASE.

The salient facts of the case, *as shown by the record and recited in the opinion of the Supreme Court of the State of Louisiana*, are as follows:

The authorities of the City of New Orleans conceived the plan of a public belt railroad system that should pass along the river front and encircle the city, connecting all the trunk lines of railroad, and reaching by means of switches every wharf, freight depot and important industry. Unfortunately the city had not the funds wherewith to carry out the project. A beginning was made, however, by entering into a contract with the Illinois Central Railroad under which, in consideration of certain concessions that railroad con-

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structed two miles of line along the river front, from the upper limit of the city down to the upper boundary of Audubon Park. The city then passed an ordinance creating a Board of Commissioners to have charge and control of the proposed Belt Railroad. The ordinance bears date of August 7, 1900, and is No. 147, N. C. S.

About two years later, February 10, 1903, there was passed an ordinance known as the Frisco ordinance, or Ordinance No. 1615, N. C. S. This ordinance embodied a scheme for the continuation of the construction of the projected belt railroad of which the Illinois Central had already constructed two miles. The scheme was that the New Orleans and San Francisco Railroad—or the Frisco, as popularly called—should construct, at its own expense, five miles of road, continuing down to Henderson Street the two miles already constructed by the Illinois Central Railroad, in consideration of which said Frisco Railroad should have the use of the belt, with the right to operate thereon its own locomotives, cars and equipment; that an account should be kept of this expense; and that every railroad, on contributing an amount at least equal, should have the right to use the belt in the same way. The ordinance made careful provision for the mode of operating the belt, both while in course of construction and when constructed.

This ordinance was passed over the veto of the then Mayor of the city, Mr. Capdevielle, who at once brought suit to annul it.

At certain places along the river front the Belt Railroad would have to pass through territory within the limits of the port of the city, under the jurisdiction of the Board of Commissioners of the port, and permission for it to pass had been previously obtained from said Board; but the permis-

sion had been granted exclusively to the City of New Orleans and only under the express condition that it should

“remain in force only so long as the Public Belt Railroad is operated and controlled by the Board of Commissioners of the Public Belt Railroad in accordance with the provisions of the ordinance creating that Commission;”

which ordinance (No. 147, N. C. S., *adopted August 7, 1900*), provided that

“the management and control of the Public Belt Railroad shall be separate and distinct from that of any railroad entering New Orleans, and shall remain forever the property of the City of New Orleans, and no employee, director or officer of any State or interstate railroad shall be employed by or allowed to act as director, commissioner or manager of the Public Belt Railroad.”

Now, whereas, the said Frisco ordinance (*No. 1615, N. C. S.*) allowed the railroads to participate in considerable degree in the operating of the belt, the Board of Commissioners of the Port, or Dock Board, considered this to be a violation of the express condition upon which alone it had granted permission to the belt road to pass through the territory of the port, and, therefore, it promptly brought suit to enjoin the Frisco from carrying out the ordinance

“in so far as it authorizes the construction and maintenance of a railroad on the wharves or landings of the port of New Orleans.”

The said suits, the Capdevielle suit and this Dock Board suit, reached the Supreme Court of Louisiana. By two judgments of said Court—one of which, that in the Capdevielle suit, became final on June 3, 1903—and the other of which, that in the Dock Board suit, became final on June 24,

1904—the demand of the Capdevielle suit was rejected and that of the Dock Board suit maintained. (*Capdevielle, Mayor of New Orleans, vs. New Orleans and S. F. R. R. Co.*, 110 La., 904; 34 So. 868; *Board of Commissioners vs. New Orleans and S. F. R. R. Co.*, 112 La. 1011; 36 So. 837.)

Over two months after the termination of the Capdevielle suit, but while the Dock Board suit was still pending, the ordinance which forms the subject-matter of the present suit (*No. 1997, N. C. S., dated September 4, 1903*), was adopted. This ordinance grants to the defendant the use of the belt road from the upper city limits to Henderson Street on paying \$50,000, upon the condition that the five miles of said road, from the upper boundary of Audubon Park down to Henderson Street, or at least a portion thereof, should be built by the Frisco; and provided that, in case the Frisco fails *without legal excuse* to construct the five miles of road called for by its contract, the defendant railroad is to construct the same on the same terms and conditions, succeeding to all the rights and obligations of the Frisco, and its doing the work is to be in lieu of paying the \$50,000; that as security for the performance of this obligation the defendant railroad is to deposit in the hands of the fiscal agent of the City, on July 1, 1904, good bonds or other securities to the amount of \$50,000. In the event the Frisco should construct only a portion of the five miles of road the defendant railroad is to have the use of the two miles constructed and of whatever portion of the five miles might be thus constructed, and instead of paying the full \$50,000, is to make payment in proportion.

The defendant made formal acceptance of the ordinance, thereby converting it into a contract.

When the adverse decision of the Dock Board suit was

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rendered, the Frisco and the City looked upon it as having put an end to the scheme by which the construction of the belt road was to be effected by means of contributions from the railroads; and the defendant appeared to have taken the same view, for it remained quiescent, and gave no sign of its intending to take any further interest in the matter for seventeen months, until November 10, 1905. It then deposited \$50,000 of bonds with one of the fiscal agents of the City as a guarantee for carrying out the contract, and notified the City of the deposit having been made.

Following defendant's revival of interest in the ordinance, as shown by the making of the fifty thousand dollars deposit, fruitless conference took place between defendant's officials and the city authorities; and then, on the 16th of May, 1906, the defendant (plaintiff in error) undertook to begin the construction of the five miles of road, and the present suit was promptly instituted by the City of New Orleans enjoining defendant (plaintiff in error) from doing so.

GROUNDS OF INJUNCTION.

The grounds of injunction were:

FIRST—That the contract with the defendant is null, because it divests the people of the city of their property without due process of law, and impairs the obligation of the City's contract with the Illinois Central, under which the two miles of track were constructed; and because it stipulates something impossible—namely, the construction upon the territory of the Dock Board of a belt road which should be in some degree under the control of the railroads.

SECOND—That the contract with defendant, if ever valid, has terminated, because it was subject to suspensive conditions which can never be accomplished; that as to that part of the contract by which defendant was to have the use of

the belt road down to Henderson Street, on paying \$50,000, the condition was that the five miles of said road from the upper boundary of Audubon Park down to Henderson Street, or at least a portion thereof, should be built by the Frisco; that as to that part of the contract by which the defendant was to be under the obligation to build said five miles of road in case the Frisco failed to do so, the condition was that the failure of the Frisco to do the work should have been without legal excuse; that as to the contract as a whole the condition was that the defendant company should deposit with the fiscal agent of the City on April 1, 1904, \$50,000 of bonds as a security for the fulfilment of the contract; that these conditions can never be accomplished because the Frisco has given up all idea of building said five miles of road and has done so with good legal excuse, and the 1st day of July, 1904, has been suffered by defendant to pass without any deposit having been made.

The further allegation is made that the Board of Commissioners of the Belt Railroad had already begun the construction of the belt road, under the provisions of the ordinance passed to that effect, when the defendant, on May 16, 1906, made the attempt to begin the work.

The Supreme Court of Louisiana in passing upon the case, as will be seen by its opinion, printed in full in the record (*Tr.*, pp. 416, *et seq.*, *print*; 127 La. 775), disposed of the City of New Orleans' first grounds of injunction, those relating to the nullity of the contract, because *ultra vires*, and because divesting the people of the City of New Orleans of their property without due process of law, and impairing the obligation of the contract with the Illinois Central, by saying that these grounds were fully considered by the Court in the Capdevielle case, *supra*—holding them not to be well founded.

The Court also held that the City's allegation that the Belt Railroad Board had already begun the construction of the five miles of road was not supported by the evidence; and that the question of whether the deposit of \$50,000 of bonds was or not made within the limit of time allowed for making it, was unimportant.

DECISION OF THE LOUISIANA SUPREME COURT.

Proceeding, however, to further consider the case, the Court said (*Tr.*, p. 429, *print*) :

"We agree with the plaintiff (the defendant in error), however, that the contract was subject to a suspensive condition, and that this condition had become impossible of realization, and the contract had, in consequence, fallen through, when the plaintiff made its attempt to begin work and the injunction was taken.

"The two ordinances, that in favor of the Frisco and that in favor of the defendant, embody a scheme for the construction of the Belt Railroad system through the agency of the railroads for whose use the same was intended, and by means of contributions from them.

"In the first of these ordinances the City said to the Frisco: 'I have already two miles of my projected belt system constructed. You construct, at your expense, but under the supervision of the Board of Commissioners of my belt railroad, five miles more. My said Board will keep an account of your expenditure in this work, and every railroad desiring to use my belt system will be required to contribute a sum equal to your said expenditure to a fund which shall be used exclusively towards completing my said belt system. In consideration of your doing this, you

shall have a right of way over my said belt system for your locomotives, trains and cars; and until the belt shall have sufficiently approached completion to justify my having an equipment of my own to operate it, you shall be my agent in operating it, and in doing so you shall observe the following regulations,' etc.

"In the second of the ordinances the City said to defendant: 'With a view of carrying out my project of constructing a belt railroad system I have made arrangements with the Frisco to prolong five miles lower down the two miles of tracks already constructed. I will give you a right of way over these seven miles of tracks for your locomotives, trains, and cars for \$50,000; and in case the Frisco does not build said five miles of tracks, then I make with you for the construction of same the same arrangement precisely which I have made with the Frisco. I make you this proposition only in the event the failure of the Frisco to build said tracks is without legal excuse—that is to say, that the opposition which the Dock Board is making to the carrying out of my arrangement with the Frisco is not sustained by the Court; for, as a matter of course, that opposition would be as fatal to the present proposed arrangement with you as to the same arrangement with the Frisco. Such a thing is possible, however, as that the Frisco should default with its contract after having partially executed it by constructing a part of the five miles of road; in that event you will pay for the use of the constructed part of my belt road a proportional part of the \$50,000, and you will continue with the construction of the five miles of tracks on the terms and conditions agreed on.' * * *

"Defendants accepted the ordinance as passed—accepted the proposition as made; hence, its contract has no greater scope than the ordinance, and is not different from it.

"That the foregoing is the proposition contained in the ordinance is, we think, perfectly plain from the mere perusal of the ordinance. * * *

"Our conclusion is that the contract with defendant was conditional upon its being possible for the Frisco or defendant to construct the five miles of road, as the initial step in carrying out the scheme of having the entire belt constructed by the railroads and contributions from them; and that when the scheme became impracticable through the Dock Board's opposition to it, the contract came to an end.

"Judgment affirmed."

NO REFERENCE TO SUBSEQUENT ORDINANCE.

The opinion of the Supreme Court of the State of Louisiana makes no reference whatsoever to Ordinance No. 2683, N. C. S., adopted October 4, 1904 (subsequent to the contract of the plaintiff in error, viz., Ordinance No. 1997, N. C. S., adopted September 1, 1903), except to recite, incidentally, and not as a point for decision, that

"the city had, in the meantime, in October, 1904, thirteen months before the date of the deposit, passed an ordinance reorganizing the Belt Road Commission, and making adequate financial and other provision for the construction and operation of the belt, and repealing all conflicting ordinances. Against that action on the part of the city defendant had made no protest; although defendant could not but have known of it, since the measure had attracted a great deal of attention; in fact, had been looked upon as

so important as to constitute an epoch in the industrial life of the city, and had been celebrated as such by a mass meeting at which speeches were made." (*Tr.*, p. 426, *print.*)

The Supreme Court of the State of Louisiana did not decide whether or not Ordinance No. 2683, N. C. S., impaired the obligation of the contract of plaintiff in error. (*Ordinance No. 1997, N. C. S.*), nor did it interpret said Ordinance No. 2683, N. C. S., in any particular. Such a decision and such an interpretation were unnecessary to the disposition of the case. Nor did the Supreme Court of Louisiana decide any Federal question propounded by plaintiff in error; nor was it necessary that it should decide any such Federal question. It decided wholly and exclusively that the contract of plaintiff in error was subject to suspensive conditions, and that such conditions having become impossible of realization, the contract had fallen through and come to an end. This ground (which is supported by the jurisprudence of the State of Louisiana, and by the decision of this Honorable Court in *New Orleans vs. Texas and Pacific Railway Company*, 171 U. S. 312), is broad enough to dispose of the whole case, and renders the decision of any Federal question absolutely unnecessary.

Therefore, this Honorable Court is without jurisdiction to review the decision of the Supreme Court of the State of Louisiana in this cause.

AUTHORITIES ON MOTION TO DISMISS.

This conclusion is sustained by numerous authorities, from a few of which we quote:

"Where the state court bases its judgment entirely upon the effect and construction of the statutes claimed to create the contract, and upon grounds

which would have been equally controlling if the later acts had not been passed, the United States Supreme Court cannot review the judgment." (*Kreiger vs. Shelly & Co.*, 125 U. S. 39.)

"The decision of a state court that an alleged contract never existed because of the want of compliance with a state statute, whereupon judgment is given wholly without reference to a subsequent statute which is alleged to have impaired the obligation of the contract, does not involve a Federal question." (*Bacon vs. Texas*, 163 U. S. 207.)

"Before the Supreme Court of the United States can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment." (*New Orleans vs. New Orleans Water Works Co.*, 142 U. S. 79.)

"The state court cannot be held to have decided a question as to the impairment of the obligation of a contract unless it has given effect to subsequent state legislation claimed to have accomplished that result." (*Lehigh Water Co. vs. Easton*, 121 U. S. 388.)

"A decision of a state court upholding a municipal tax on a bridge on the ground that the bridge company, by accepting its franchise from the city, voluntarily agreed that the bridge should be subject to taxation, rests upon a ground broad enough to dispose of the case without reference to the Federal question involved in the contention that the tax ordinances of the city impaired the obligations of its charter from the state, and of a contract which the bridge company entered into with a railroad company for the maintenance and operation of the

bridge." (*Henderson Bridge Co. vs. Henderson*, 141 U. S. 679.)

"Where the state court rested its judgment enforcing the payment of taxes on railway property, not upon the ground that such property was rendered taxable by any law passed subsequent to the company's charter, but that under the terms of the charter itself such property was taxable, the Supreme Court of the United States is without jurisdiction to review that judgment." (*St. Paul, M. & M. R. Co. vs. Todd County*, 142 U. S. 282.)

"Appellate jurisdiction by the United States Supreme Court cannot be sustained where the decision of the state court appealed from was made upon rules of general jurisprudence, or other grounds broad enough in themselves to sustain the judgment without considering a Federal question appearing in the case, but not necessarily involved." (*New Orleans vs. New Orleans Water Works Co.*, 142 U. S. 79.)

"A decision of a state court on an independent ground broad enough to sustain the judgment cannot be reviewed by the Supreme Court of the United States on the ground that a Federal question was involved." (*Missouri Pacific Ry. vs. Fitzgerald*, 160 U. S. 556.)

"Where the Supreme Court of a state decides a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question." (*Hammond vs. Connecticut Mut. L. Ins. Co.*, 150 U. S. 633; *Brooks vs. Missouri*, 124 U. S. 394; *Hale vs. Akers*, 132 U. S. 554; *Hopkins vs.*

McLure, 133 U. S. 380; *Beatty vs. Benton*, 135 U. S. 244; *Beaupre vs. Noyes*, 138 U. S. 397; *East Tennessee V. & G. R. Co. vs. Frazier*, 139 U. S. 288; *Delaware City, S. & P. S. B. Nav. Co. vs. Reybold*, 142 U. S. 636; *Haley vs. Breeze*, 144 U. S. 323; *O'Neil vs. Vermont*, 144 U. S. 323; *Northern Pacific Co. vs. Ellis*, 146 U. S. 458; *Eustis vs. Bolles*, 150 U. S. 361; *Connecticut ex rel. New York & N. E. R. Co. vs. Woodruff*, 152 U. S. 689.)

"The determination by a state court of a Federal question adversely to plaintiff in error will not sustain the jurisdiction of the Supreme Court of the United States, if another question, not Federal, was also raised and decided against him and the decision thereof is sufficient, notwithstanding the Federal question, to sustain the judgment." (*Harrison vs. Morton*, 171 U. S. 38; *Bacon vs. Texas*, 163 U. S. 207; *Egan vs. Hart*, 165 U. S. 188; *Del Castillo vs. McConico*, 168 U. S. 674; *Pierce vs. Somerset R. Co.*, 171 U. S. 641; *Chappell Chemical & Fertilizer Co. vs. Sulphur Mines Co.*, 172 U. S. 465; *Brooks vs. Missouri*, 124 U. S. 394; *Union Nat. Bank vs. Louisville, N. A. & C. R. Co.*, 163 U. S. 325.)

"It is not enough, to give this court jurisdiction over the judgment of a state court, for the record to show that a Federal question was argued or presented to that court decision. It must appear that its decision was necessary to the determination of the case, and that it was actually decided, or that judgment could not have been given without deciding it." (*Moore vs. Mississippi*, 21 Wall 636; *Bolling vs. Lersner*, 91 U. S. 594; *Brown vs. Atwell*, 92 U. S. 327; *Louisiana ex rel Citizens Bank vs. Board of Liquidation*, 98 U. S. 140; *Endowment & Benevolent*

Assn. vs. Kansas, 120 U. S. 103; *Marrow vs. Brinkley*, 129 U. S. 178; *Church vs. Kelsey*, 121 U. S. 282; *De Laussure vs. Gaillard*, 127 U. S. 216; *Blount vs. Walker*, 134 U. S. 606; *Johnson vs. Risk*, 137 U. S. 300; *Cook County vs. Calumet & C. Canal & Dock Co.*, 138 U. S. 635; *Walter A. Wood Mowing & Reaping Machine Co. vs. Skinner*, 139 U. S. 293; *California Powder Works Co. vs. Davis*, 151 U. S. 389.)

"To give this court appellate jurisdiction under §25 of the judiciary act (or U. S. Rev. Stat. §709, U. S. Comp. Stat. 1901, p. 575), two things should have occurred and be apparent in the record; first, that some of the questions stated in the section did arise in the court below; and, second, that a decision was actually made thereon by the same court in the manner required by the section." (*Commercial Bank of Cincinnati vs. Buckingham*, 5 How. 317; *M'Kinley vs. Carroll*, 12 Pet. 66; *Crowell vs. Randell*, 10 Pet. 368; *Chauteau vs. Gibson*, 111 U. S. 200.)

"Even though it does not conclusively appear to be the fact, yet, where the state court may properly have disposed of the case without deciding the Federal question, its judgment is not reviewable in the Supreme Court of the United States." (*Klinger vs. Missouri*, 13 Wall. 257.)

"When the state court gives no effect to a subsequent state law, and decides on grounds independent of it that the right claimed was not conferred by the contract, the United States Supreme Court has no jurisdiction." (*New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*, 125 U. S. 18; *Winona & St. L. R. Co. vs. Plainview*, 143 U. S. 371; *Douer vs. Richards*, 151 U. S. 666; *Bacon vs. Texas*, 163 U. S. 216.)

"Where the judgment of a state court might have been based either upon a state law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did base it upon the other ground, the Supreme Court will not take jurisdiction, even though it thinks the state court decided erroneously." (*Klinger vs. Misosuri*, 13 Wall. 257; *Kennebec & P. R. Co. vs. Portland & K. R. Co.*, 14 Wall. 26; *Dibble vs. Bellingham Bay Land Co.*, 163 U. S. 69; *Meyer vs. Richmond*, 172 U. S. 100.)

Should, however, Your Honors decide to review the entire case, then the following brief of the facts and pleadings in the case, and the argument thereon, is respectfully submitted.

STATEMENT OF THE CASE.

On June 26, 1906, Martin Behrman, Mayor of the City of New Orleans, brought suit in the Civil District Court for the Parish of Orleans, State of Louisiana, against the Louisiana Railway & Navigation Company, to restrain defendant from claiming rights under an alleged contract with the city for construction and use of a part of a belt railway. The decree of the Civil District Court was for complainant, and, on appeal to the Supreme Court of the State of Louisiana, the decree of the lower court was affirmed. From that decree the defendant prosecuted the present writ of error.

HISTORICAL FACTS.

I.

THE PUBLIC BELT RAILROAD IDEA.

About twenty years ago the authorities of the City of New Orleans, believing that the city's open and public water front was its most valuable asset, the preservation of which was essential to the proper evolution of New Orleans as a leading seaport and great distributing center, and realizing that if it continued its past policy of granting extensive sections of water front to railroad corporations, to be by them reduced to private and exclusive use and occupation, there would remain to the public for general commercial purposes but little or no open space along the river, conceived the plan of a public belt railroad system that should pass along the river front and encircle the city, connecting all trunk lines of railroad, and reaching, by means of switches, every wharf, freight depot and important industry.

The establishment of such a belt railroad system was intended to obviate the incumbrance of streets and landings and do away with the delays, restrictions and expense to shippers which experience has shown to accompany the operation of switching and terminal facilities by private corporations, even under the most stringent regulations.

This belt railroad system was to be a *public* belt railroad system. It was to be exclusively owned, controlled and administered by public authority; it was to be exclusively operated by a public belt railroad equipment, and it was to be operated in such a manner that all railroads could have their cars handled to and from the public wharves and elsewhere without any further necessity for grants to railroad cor-

porations of private track or wharf rights along the water front. This was the very animus of the public belt railroad idea.

OPPOSITION OF PRIVATE RAILROADS.

Such a public belt railroad system—a public utility—being by its very character at variance with private terminal systems, railroad corporations having term grants for private terminals, and railroad corporations seeking such grants were naturally opponents of the plan. An issue, therefore, arose of public terminals as against private terminals—public terminals, not only for the benefit and advantage of all transportation companies, but for all local interests, as against private terminals for the special benefit and advantage of the railroad corporations controlling and operating them.

II.

THE TEXAS & PACIFIC RAILROAD CASE (171 U. S. 312.)

When the agitation for a public belt railroad system began there was pending in the Supreme Court of the United States a cause in which the City of New Orleans was asserting the nullity of a number of valuable grants improvidently made to the New Orleans Pacific Railway Company (and by it transferred to the Texas & Pacific Railway Company) one of which—the grant of a right to construct, maintain and operate railroad tracks along a large portion of the river front—meant the absorption by the Texas & Pacific Railway Company, for its exclusive use and purposes, of the last stretch of open river front available for a public belt railroad system.

The argument in this case was that this grant, with others, was given to the railroad company subject to condi-

tions precedent, or to use the language of the law of Louisiana, subject to suspensive conditions, and that in consequence of the failure of the conditions to eventuate, the railroad company never acquired the right to enjoy the privileges granted, and hence ordinances repealing the grants were valid.

The loss of this cause would have been very unfortunate for the City of New Orleans. The Supreme Court of the United States, however, decided that the rights were subject to suspensive conditions, and that, from the facts of the case, the railroad company was not entitled to possess or enjoy them. (*New Orleans vs. Texas & Pacific Railway Company*, 171, U. S. 312, 344.)

III.

THE ILLINOIS CENTRAL ORDINANCE, NO. 15080, C. S.

This decree of the United States Supreme Court secured to the city an opportunity to put into execution its idea of a public belt railroad system. A beginning was made in 1899. In that year the Chicago, St. Louis & New Orleans Railroad Company (Illinois Central Railroad Company, lessee), which, prior to that time, had been operating a belt railroad in connection with its business at its Stuyvesant Docks and elsewhere, found it necessary, on account of the approaching expiration of a grant covering the operation of a portion of its tracks, to apply to the city for a new right of way to reach its docks upon the river front.

After the consideration and rejection of several plans, the Council of the city adopted, on March 1, 1899, Ordinance No. 15,080, C. S. (*Record print*, p. 236).

Under the provisions of this ordinance, a street, 110 feet wide, with a neutral ground 50 feet wide in the center

thereof, was constructed along the river front from the upper limits of the city (Protection Levee) to Peniston Street, by the addition of private property to existing streets and by the opening of a new street, 110 feet wide, with a neutral ground 50 feet wide in the center thereof, the whole cost of private property necessary therefor being paid by the Chicago, St. Louis & New Orleans Railroad Company (Illinois Central Railroad Company, lessee). (*Record print*, pp. 236, 239.)

The private property acquired for the construction of said street was perpetually dedicated to public use for street purposes and uses as provided for by the ordinances. (*Record print*, p. 239).

By other provisions of this ordinance the railroad company was authorized and empowered to locate, construct, maintain, freely use and operate, along the inner or lake side of the neutral ground above referred to, and as part of its railroad and railroad system, two main railroad tracks, with spurs and switches, subject to the terms and conditions of the ordinance. (*Record print*, p. 238).

By one of these terms and conditions the said railroad company was bound to locate and construct, on the neutral ground above mentioned, and on the outer or river side of the two tracks to be constructed for its own use and operation, from the upper limits of the city (Protection Levee) to the upper line of Audubon Park, a distance of about two miles, two other tracks, with connecting tracks, spurs and switches, similar in all respects to the tracks to be constructed for itself, and said railroad company was further bound to "dedicate said two railroad tracks, connecting tracks, spurs and switches in full ownership and complete title to the City of New Orleans for perpetual public use." (*Record print*, p. 239).

This ordinance was duly executed, and the people of the City of New Orleans became the holders and owners (1) of complete title to said two railroad tracks, the same to be perpetually used by the public, and (2) of complete title to the outer half of said neutral ground, for the purpose of constructing and maintaining thereon extensions of said railroad tracks for perpetual public use.

IV.

THE PUBLIC BELT RAILROAD ESTABLISHED, ORDINANCE 147, N. C. S.

Subsequently, on August 7, 1900, by Ordinance No. 147, N. C. S. (*Record*, p. 254), the Council of the city created a belt railroad board, the objects and purposes of which were to acquire, construct, control, maintain and operate, in the name of and for the benefit of the City of New Orleans and its citizens, a public belt railroad, to be located along the river front from the upper limits of the city (Protection Levee) to Press Street, near the lower limits of the city, and to be extended around and through the city upon such streets as the Council might designate. This board was authorized and empowered to do all things necessary to carry out its objects and purposes, and was especially directed to construct without delay two tracks along the lower section of the river front between Girod and Barracks Streets, to take possession of the "Shrieber" belt tracks (the franchise for which had expired in 1899), and to connect all tracks, as early as practicable, with the two miles of track to be constructed for the city by the Illinois Central, as above recited, so as to create a double track belt railroad from the upper to the lower limits of the city. The ordinance appropriated \$40,000 for construction purposes.

The ordinance also provided "that the management and control of the public belt railroad shall be separate and distinct from that of any railroad entering the City of New Orleans and shall remain forever the property of the City of New Orleans; and no employee, director or officer of any State or interstate railroad shall be employed by or allowed to act as director, commissioner or manager of the public belt railroad." (*Section 8; Record print, p. 257*).

V.

PORT COMMISSION'S APPROVAL OF PUBLIC BELT RAILROAD.

By resolution of August 12, 1902 (*Record, p. 284*), the Board of Commissioners of the Port of New Orleans approved the dedication, for the purpose of a public belt railroad reservation, of certain space along the river front, insofar as said dedication concerned the space within the jurisdiction of the Board, providing, however, that the approval should remain in force only so long as the public belt railroad is operated and controlled by a public commission, in accordance with the provisions of Ordinance No. 147, N. C. S.

VI.

APPLICATION OF FRISCO FOR FACILITIES.

Some few months after the adoption of this resolution a number of persons, supposedly representing the *St. Louis & San Francisco Railroad Company*, one of the great transportation systems of the United States, appeared in New Orleans and created the belief in the public mind that that company was about to construct and operate its line into the City of New Orleans, and, in order to do so, required rights to construct, maintain and operate main and switch tracks and other terminal facilities.

The construction and operation of a new line of railway through the State of Louisiana, into the City of New Orleans, was an important thing, which, of course, all good citizens desired, and the Council of the City of New Orleans, not because the public belt railroad plan was impracticable, but because it believed that the *St. Louis & San Francisco Railroad Company* was about to enter New Orleans, was impelled to adopt, on February 10, 1903, the "Frisco" ordinance, No. 1615, N. C. S. (*Record print*, p. 243), granting a right of way and depot and other rights and privileges to the *New Orleans & San Francisco Railroad Company*—the "*New Orleans & San Francisco Railroad Company*" (herein called the Frisco), being, supposedly, a local corporation standing for the *St. Louis & San Francisco Railroad Company*.

Unfortunately this ordinance, even if intended so to do by its promoters, never had the effect of inducing the *St. Louis & San Francisco Railroad Company* to come into New Orleans, but only brought, as a result, railroad facilities to a private terminal company, enabling it presently to compete with the public belt system.

VII.

THE FRISCO ORDINANCE NO. 1615, N. C. S.

The Frisco ordinance (No. 1615, N. C. S.), among other valuable rights, granted to the *New Orleans & San Francisco Railroad Company*, its successors and assigns:

A right of way "over the double track belt line and reservation on the river front of the City of New Orleans from the upper limits of the city to Henderson Street, upon the following terms and conditions:

"(a) That said company shall, at its own cost and expense, construct and dedicate to perpetual pub-

lic use, the double track as now projected from the end of the rails on the upper side of Audubon Park to Henderson Street, with all necessary and convenient cross-overs, switches and spur tracks"—(i. e., *said company shall construct about five miles of road, continuing down to Henderson Street the two miles of road constructed by the Illinois Central Railroad Company in accordance with the terms of Ordinance No. 15,080, C. S., referred to above*)*—such construction to be completed before July 1st, 1904, under the direction of the public belt authorities of the City of New Orleans. Said company shall keep an accurate account of said cost of construction as herein provided and shall present said account with proper vouchers to the said public belt authorities, who shall audit the same for the purpose of determining the aggregate amount expended under this clause of this paragraph, of this ordinance.

"(b) That the city shall furnish a clear legal right of way for the construction of said tracks, but said company shall pay the cost and expense of removing any tracks or structures that may physically obstruct said legal right of way, and any expropriation expenses not to exceed twenty thousand dollars (\$20,000.00).

"(c) That the legal title to the whole of said belt tracks, switches, spurs, sidings, etc., constructed and to be constructed, shall be in the City of New Orleans, and the city shall be the sole owner of all of said tracks and their appurtenances at all times and under all circumstances.

*Inserted for elucidation.

"(d) That said tracks shall, upon the completion of the city's belt system to Clouet Street, be under the sole and exclusive control and management of the Public Belt authorities of the City of New Orleans.

"That, in order to provide for a completion of said belt system to Clouet Street in its further continuation, said Public Belt authorities shall have the right and power to grant the right of use of said tracks to any railroad now in, or that may hereafter come into, the City of New Orleans, exacting as a condition of said grant from each of said railroads to which said right of use is granted a sum equal to the amount expended as aforesaid, by the 'New Orleans and San Francisco Railroad Company' for construction of said belt tracks to Henderson Street."

(The sums of money to be so exacted are, by the terms of this subdivision, to be deposited with the city's fiscal agents for the special purpose of constructing extensions of belt tracks below Henderson Street as part of the city's public belt system, "and, for the payment of the cost of right of way for such belt system," the "New Orleans and San Francisco Railroad Company," or other companies contributing, "are to have the right to use said completed belt," the use to be under the management and control of the Public Belt authorities, and each using company to contribute to maintenance and to those expenses of operation and management usual and proper in such cases on a wheelage basis).

"(e) The New Orleans and San Francisco Railroad Company, and all other contributing railroads using the belt line, shall have the right to operate their own locomotives, cars and equipment over the

said Public Belt under the control of the Public Belt authorities."

* * * * *

"(f) That all controversies between the said New Orleans and San Francisco Railroad Company, on the one side, and the city or her Public Belt officials, or any other company or companies to which the city or her Public Belt authority may grant the use of said tracks and appurtenances, on the other side, relative to the use of said tracks and appurtenances, or to the cost of construction and maintenance thereof, or to the rules and regulations relative to the movement of handling cars, trains and traffic thereon and thereover, shall be submitted to the arbitration of three disinterested persons, one to be selected by said New Orleans and San Francisco Railroad Company, the second by the city or her Public Belt officials, or such other company or companies, as the case may be, and the third by the two thus chosen; and the decision of this tribunal, or any two of them, shall have the effect of an amicable composition.

* * * * *

"(j) That the movement of trains, cars and traffic on and over said tracks from the upper limits of the city to Henderson Street, until the city completes her belt system to Clouet Street and begins to operate them as part of said system, shall be under the direction, control and management of said company; and, when the city begins to operate said tracks as part of her completed belt system, the movement of trains, cars and traffic on and over said tracks shall be under the sole direction, control and management of the Public Belt authority of the City of New Orleans; provided, always, that there shall be

no discrimination against the cars, trains and traffic of said company, or of any other company granted, as above provided, the right to use said tracks."

* * * * *

"If, however, the belt is not completed to Clouet Street by July 1, 1907, the sole control and management of said tracks shall revert to the Public Belt authority of the City of New Orleans July 1, 1907."

(Portions italicized are referred to in the argument).

VIII.

THE CAPDEVIELLE SUIT.

The Frisco ordinance (No. 1615, N. C. S.) was passed over the veto of Mayor Capdevielle, who at once brought suit to annul it.

This suit was finally decided by the Supreme Court of Louisiana on the 26th day of June, 1903. The decision was adverse to the contentions of plaintiff, and the Frisco ordinance was declared to be valid. (*Capdevielle, Mayor, vs. New Orleans & San Francisco Railroad Co. et al.*, 110 La. 904, *et seq.*)

IX.

APPEARANCE OF DEFENDANT'S ATTORNEYS AS AMICI CURIAE.

While the Capdevielle suit was pending in the Louisiana Supreme Court on application for rehearing, the attorneys for the Shreveport & Red River Valley Railroad Company, the predecessor of the Louisiana Railway & Navigation Company, defendant herein, filed a printed brief submitting to the court three questions (*see Record print, p. 334*), with the request that the judgment of the court be so reformed as to pass upon them specifically.

In its opinion on rehearing, the court referred to this brief as a brief filed by the attorneys as *amici curiae*. With regard to the questions propounded, the court held that they were covered by the original opinion, and in no way reformed its judgment.

(This action of the attorneys for the said railroad company in filing, and of the Supreme Court in referring to, the brief above mentioned, was sought to be used by the defendant company in this case as a basis for a plea of *res judicata*, hereinafter considered at page 57).

X.

DELAYS ALLOWED TO FRISCO EXTENDED.

After the institution of the Capdevielle suit, to-wit, on March 3, 1902, the City Council resolved that the delays for the performance by the Frisco of the obligations imposed upon it by Ordinance No. 1615, N. C. S., should not begin to run until the Capdevielle suit should be finally decided. (*Record print*, p. 337).

(We call the court's attention to this resolution, because it is important in connection with a deposit of fifty thousand dollars, which, by its ordinance, the defendant company in this case was obliged to make on or before the 1st day of July, 1904, hereinafter considered on page 88).

XI.

THE PORT COMMISSION SUIT.

On March 9, 1903, while the Capdevielle suit was pending, a suit was instituted by the Board of Commissioners of the Port of New Orleans against the New Orleans and San Francisco Railroad Company, enjoining it from executing Ordinance 1615, N. C. S. (the Frisco ordinance),

upon the ground that the Board of Commissioners of the Port of New Orleans had been vested by the State with control and charged with the administration of the harbor, port, wharves and landings of the port of New Orleans; that, by virtue of the authority so conferred, for the performance of the duties so imposed it had exclusive jurisdiction to determine whether a public belt railroad shall be constructed and operated upon the landings in question, and, if so, upon what terms and conditions; that the City of New Orleans, fully recognizing such jurisdiction, had forwarded to it for its approval a *project* of an ordinance (Ordinance 147, N. C. S.) providing for the construction and maintenance of a railway, the projected line of which impinged upon said landings, and that plaintiff approved the same upon certain conditions; that the city thereafter adopted an ordinance (No. 1615, N. C. S., the Frisco ordinance), which was not submitted to or approved by plaintiff, which ignored its authority, and the purpose and effect of which are, and will be, to divest the Port Commission's control and possession of a portion of said landings and transfer the same to the city's grantee, the New Orleans & San Francisco Railroad Company.

In this suit the City of New Orleans filed an answer in which it was alleged that the adoption of Ordinance No. 1615, N. C. S., was a valid exercise of the legislative power of the City of New Orleans; that the wharves and landings were public property, over which the Port Commission had nothing but administrative powers, and that neither the city nor the New Orleans & San Francisco Railroad Company were under any obligation to ask the Port Commission's consent to lay and operate a railroad over, along and across said public property.

This suit reached the Supreme Court of Louisiana, and

was finally decided by it on May 23, 1904. That Court held that the ordinance in question (paragraph 10 of Section 2 of Ordinance 1615, N. C. S., the Frisco ordinance), not being the same as that which had received the approval of the Board of Port Commissioners (Ordinance No. 147, N. C. S., the Public Belt Railroad ordinance), and not having received such approval, was inoperative, as the jurisdiction over the wharves and landings of the Port of New Orleans was, by law, vested in the Port Commission. (*Board of Commissioners for Port of New Orleans vs. New Orleans & S. F. R. R. Co. et al.*, 112 La. Rep. 1011).

(The allegation made in the answer filed by the city that the adoption of Ordinance No. 1615, N. C. S., was a valid exercise of the city's legislative power, is here specially referred to, as defendant's counsel seek, in the instant case, to make it the foundation for a plea of judicial estoppel, hereinafter considered at page 60).

XII.

DEFENDANT'S ORDINANCE, NO. 1997, N. C. S.

On September 1, 1903, a little over two months after the *Capdevielle case* (*ante*, p. 29) was finally decided, and while the *Port Commission case* (*ante*, p. 30) was still pending, the ordinance presently at issue (Ordinance No. 1997, N. C. S.), entitled "An ordinance granting rights of way and depot and other rights and privileges to the Louisiana Railway & Navigation Company," was adopted by the Council. (*Record*, print p. 258). This ordinance gave to the defendant company most valuable grants, all of which it is presently enjoying, except that covered by Section 3 of the ordinance—to operate its locomotives, cars and equipment along the river front from the Protection Levee to

Henderson Street. Section 3 is as follows (the italicized portions being referred to in the argument) :

"Sec. 3. Be it further ordained, etc., That, whereas, under Ordinance No. 1615 (N. C. S.), the New Orleans & San Francisco Railroad Company, its successors or assigns, have been granted the right to construct, at their own cost and expense, the double track belt line over the belt reservation on the river front, from the present end of the public belt, on the upper side of Audubon Park, to Henderson Street, and under said ordinance the company dedicates said tracks to perpetual public use; therefore, under the belt provisions of said Ordinance No. 1615 (N. C. S.), 'and with the limitations therein which recognize and preserve the present and future rights of the City of New Orleans over the projected public belt railroad,' *the Louisiana Railway and Navigation Company is hereby granted a right of way over the double track belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson Street, upon the following terms and conditions:*

"(a) *That, when said Louisiana Railway and Navigation Company shall operate its engines, trains and cars over said belt tracks, as provided in this ordinance, for a period of thirty days, the said company shall pay to the City of New Orleans the sum of fifty thousand dollars (\$50,000), which sum is to be deposited with the fiscal agent of the City of New Orleans to the credit of a special fund, and said fund shall not be used for any other purpose than the extension, equipment and operation of said public belt line and the construction of said belt tracks, switches, side tracks, spurs and turnouts, and the payment of*

the costs of right of way for such belt system; but no portion of this money shall be used for expenses of operation until the belt tracks are completed to Clouet Street, and when said company shall be ready to begin to operate its engines, trains and cars, as above provided, the said company shall deliver to the fiscal agent of the City of New Orleans bonds or other securities satisfactory to said fiscal agent of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company with the foregoing obligation, and to be returned to said company when said company shall have operated its engines, trains and cars over said belt tracks, as provided in this ordinance, for a period of thirty days, and shall have paid said sum of fifty thousand dollars to said fiscal agent. If, for any reason, said company shall not have, or be accorded, the right to operate its engines, trains and cars over said belt tracks, as provided in this ordinance, then such securities shall be returned to said company by said fiscal agent.

“(b) That, in consideration of the payment of the above sum, the Louisiana Railway and Navigation Company shall have the right to operate its own locomotives, cars and equipment over the said public belt from the upper city limits to Henderson Street, provided that said company and all railroads using said tracks shall belt all cars to and from their respective lines over all switches, spurs and sidings forming part of the public belt tracks, free of cost.

“(c) That, in the event of the New Orleans & San Francisco Railroad Company, its successors or assigns, failing, without legal excuse, to build said belt tracks from the upper side of Audubon Park to

Henderson Street, on or before July 1, 1904, the Louisiana Railway and Navigation Company shall build the same from the upper side of Audubon Park to Henderson Street under the terms and conditions of paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.; and, in case said Louisiana Railway and Navigation Company shall build said tracks, it is hereby granted the right and privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of said paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., said Louisiana Railway and Navigation Company assuming the obligation of the New Orleans & San Francisco Railroad Company under said paragraph of said ordinance, and being hereby granted all the rights and privileges of said New Orleans & San Francisco Railroad Company, its successors or assigns, under said paragraph 10 of Section 2 of said ordinance, except as hereinafter provided, such construction of said tracks from the upper side of Audubon Park to Henderson Street to be in lieu of the payment of \$50,000 referred to in paragraph (a) of this section; provided, that said Louisiana Railway and Navigation Company shall complete the said tracks to Henderson Street within one year from the time the city shall furnish the clear and undisputed right of way, it being always understood that said Louisiana Railway and Navigation Company assumes all the obligations of the New Orleans & San Francisco Railroad Company under paragraph 10 of Section 2 of said Ordinance No. 1615 (N. C. S.); and provided that, as soon as said belt tracks shall be completed to Henderson Street, the same shall be turned over to the immediate ownership of the City of New Or-

leans, and to be under the control and management of the Public Belt authority; and provided, further, that said Louisiana Railway and Navigation Company shall, on July 1, 1904, deposit with the fiscal agent of the City of New Orleans bonds or other securities satisfactory to said fiscal agent of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company with the foregoing obligation, and to be returned to said company when said company shall have built and completed said belt tracks from the upper side of Audubon Park to Henderson Street; and provided, further, that, in case said company shall be prevented from building said belt tracks or any portion of the same, on account of the city not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said fiscal agent.

"Provided, further, that nothing in this ordinance, or in this section or clause, shall be construed as a waiver or abandonment of the rights that the City of New Orleans now has or may hereafter have under and by virtue of the provisions of Ordinance No. 1615, N. C. S.; and provided, further, that nothing in this ordinance, section or clause shall be construed to relieve the New Orleans & San Francisco Railroad Company, its successors or assigns, from any of its obligations to the City of New Orleans arising under the provisions of Ordinance No. 1615, N. C. S., and especially under paragraph 10 of Section 2 of said ordinance, it being distinctly understood and declared that the city shall be entitled to enforce all its rights under said Ordinance No. 1615, N. C. S., pre-

cisely as if this present ordinance had not been passed at all.

“(d) That, in the event the New Orleans & San Francisco Railroad Company, its successors and assigns, shall from any cause complete only a portion of the tracks from the upper side of Audubon Park to Henderson Street, the Louisiana Railway and Navigation Company, its successors and assigns, shall have the right to operate its own locomotives, cars and equipment over such portion of the tracks as is already built, and as may be built by the New Orleans & San Francisco Railroad Company, its successors and assigns, and for such privilege shall pay to the City of New Orleans such proportion of the sum provided in clause (a) of this paragraph as the tracks so constructed and used by said Louisiana Railway and Navigation Company bear the whole length of the tracks from the upper city limits to Henderson Street.

“(e) Unless otherwise ordered by the ‘Public Belt authority,’ or until said ‘Public Belt authority’ is operating its own equipment over said system completed to Clouet Street, the Louisiana Railway and Navigation Company agrees to belt cars belonging to connecting railroads, or to individuals, firms or corporations, over the belt line, and over all switches, spurs and sidings connected therewith and forming part thereof, without discrimination, treating and handling such belted cars as justly and as equitably as if they were its own cars coming off its own lines, charging for such service not exceeding \$2 per car, for placing a car and returning same empty, or *vice versa*; provided, however, that a similar obligation shall be hereafter placed on every contributing rail-

road hereafter admitted to the use of said belt tracks; and provided, further, that said Louisiana Railway and Navigation Company shall not under this clause, or under any other clause of this ordinance, be obligated to belt cars for any railroad company not now operating a line in the City of New Orleans, unless such other railroad shall become a contributor as herein provided to the belt road construction fund.

“(f) That all controversies between the Louisiana Railway and Navigation Company on the one side, and the Public Belt authority, or any other company or companies to which the city or her Public Belt authority may grant the use of said tracks and appurtenances, on the other side, relative to the use of said tracks and appurtenances, or the cost of construction or maintenance thereof, or the rules and regulations relative to the movement and handling of cars, trains and traffic thereon and thereover, shall be submitted to the arbitration of three disinterested persons; one to be selected by said Louisiana Railway and Navigation Company; the second by the Public Belt authority, or such other company or companies, as the case may be; and the third by the two thus chosen and the decision of this tribunal, or any two of them, shall have the effect of an amicable composition.

* * * * *

“(j) That the movement of trains, cars and traffic on and over said tracks from the upper limits of the city to Henderson Street, until the city completes her belt system to Clouet Street, and begins to operate them as a part of said system, shall be under the joint direction, control and management of the New Orleans & San Francisco Railroad Company, its suc-

cessors and assigns, and the Louisiana Railway and Navigation Company, its successors and assigns, unless during this period the public belt authority shall grant other railroads a right of operation over said tracks similar to that herein granted to the Louisiana Railway and Navigation Company, in which event the control and management of movement of trains, cars and traffic over said tracks to Henderson Street shall be under the joint control of such companies as may be granted the same right of operation over said tracks, and when the city shall begin to operate said tracks as part of her belt system, the movement of trains, cars and traffic on and over said tracks shall be under the sole direction, control and management of the Public Belt authority of the City of New Orleans; *provided, always, that there shall be no discrimination against the trains, cars and traffic of the Louisiana Railway and Navigation Company, or any other company, granted the right to use said tracks.* Until the city begins to operate said tracks as a part of her belt system, the whole cost of maintenance, operation and management shall be borne jointly by the New Orleans & San Francisco Railroad Company, its successors and assigns, and the Louisiana Railway and Navigation Company, its successors and assigns, on a wheelage basis, unless during this period the Public Belt authority shall grant to other railroads a right of operation over said tracks similar to that herein granted to said Louisiana Railway and Navigation Company, in which event the cost of maintenance and the usual and proper parts of the cost of operation and management shall be borne on a wheelage basis by all companies operating over said tracks. If, however, the

belt is not completed to Clouet Street by July 1, 1907, and the tracks to Henderson Street, or any part thereof, are constructed by the New Orleans & San Francisco Railroad Company, the sole control and management of said belt tracks shall revert to the public belt authorities of the City of New Orleans; provided, always, if, for any reason, the City of New Orleans or her public belt authorities shall not assume control and management of said tracks on July 1, 1907, the Louisiana Railway and Navigation Company shall have the same right of control and management of the movement of trains, cars and traffic over said tracks as has heretofore, or may be hereafter, granted to any railroad company.

“(k) That, in the event said belt tracks shall be completed to Clouet Street, and said Louisiana Railway and Navigation Company shall desire to use that portion of the belt which may be built from Henderson Street to Clouet Street, it shall have the right to operate its trains, cars and traffic over the completed belt upon the payment to the fiscal agent of the city for the use and benefit of the belt fund of a sum which, added to the sum to be paid under clause (a), Section 3, of this ordinance, shall make the total sum paid by said Louisiana Railway and Navigation Company equal to the cost of the construction of the belt tracks from the upper side of Audubon Park to Henderson Street, expended by the New Orleans & San Francisco Railroad Company, its successors and assigns, in the construction of said tracks from the upper side of Audubon Park to Henderson Street, as provided in Ordinance No. 1615, N. C. S.:

“‘Provided that, in the event the belt shall be extended to Clouet Street, and that the Louisiana Rail-

way and Navigation Company shall not avail itself of the right to pay the additional sum as above provided, and use the belt to Clouet Street, within a period of five years from the time said belt is completed to Clouet Street, then, and in that event, the said Louisiana Railway and Navigation Company shall pay to the Public Belt authority of the City of New Orleans the sum of thirty thousand dollars (\$30,000), the use and destination of said sum to be the same as provided for in the payment of the fifty thousand dollars (\$50,000) as above provided for. Said additional payment of thirty thousand dollars shall in no wise, however, authorize the using of the belt below Henderson Street by the said Louisiana Railway and Navigation Company.

“ Provided, further, that any use by the Louisiana Railway and Navigation Company of the belt track from Henderson Street to Clouet Street, after the same shall have been completed, shall be deemed conclusive evidence of its agreement to accept the use of said entire belt, but shall not bind the said Louisiana Railway and Navigation Company as admitting the cost of the construction from the upper limits of Audubon Park to Henderson Street, to be the amount stated by the New Orleans & San Francisco Railroad Company, its successors and assigns. It being understood that this right is granted under the limitations of Ordinance No. 1615, N. C. S., which recognize and preserve all the present and future rights of the City of New Orleans over the projected belt railroad from the upper limits of the city to Clouet Street.’ ”

XIII.

PUBLIC BELT RAILROAD BOARD RE-ORGANIZED, ORDINANCE 2683,

N. C. S.

On October 8, 1904, the Council of the City of New Orleans passed Ordinance No. 2683, N. C. S. (Record, print p. 268) entitled:

"An ordinance amending and re-enacting Sections 1, 2 and 4, and repealing Sections 3, 5, 8, 9 and 11, of Ordinance No. 147, N. C. S., adopted August 7, 1900; adding to said ordinance as new sections a section to be numbered 3, and a section to be numbered 11; and renumbering Section 10 of said ordinance to be known as Section 8."

The preamble of this ordinance is as follows:

"Whereas, the industrial progress of the City and Port of New Orleans renders it a matter of great, and even vital, importance that a system of terminal deliveries should be devised, whereby all railroads, all industries and all water craft be enabled to transfer goods without restriction, discrimination or delay; and,

"Whereas, the present system, as far as it goes, has encumbered the streets and landings of the city with portions of track, belonging to various corporations, whose competitive interest compels delays and restrictions, at times amounting to prohibitions; and,

"Whereas, this situation, limiting industries, as it does in many cases, to the facilities of the railroad on whose track it is located; and,

Whereas, this situation further prevents the location of new industries, that require the widest and

freest facilities for collection and distribution of their goods; and,

"Whereas, it is of great importance that facilities should be provided for the location of industries in the rear of the city, and on the banks of the navigation canals, as well as on the front, whereby said industries, and those in the present commercial district, can reach and be reached by every railroad or steamship line now trading with the city, or hereafter to come; and,

"Whereas, in the rear of the city there is a large area of unimproved property that provided with terminal facilities as expressed above, would be rapidly improved by various industries; and,

"Whereas, such a terminal system could easily establish and operate an industrial and real-estate bureau for securing and locating new industries; and,

"Whereas, such a terminal system would greatly facilitate the work of collecting and disposing of city garbage, the filling of lots, and similar work of public and private utility; and,

"Whereas, public policy dictates that new railroads entering New Orleans, and those now here, whose franchises are insufficient, or nearly expired, should be furnished terminal facilities upon a broad, permanent, well-defined plan, without discrimination; and,

"Whereas, all this can only be secured and availed of by public ownership and control; and,

"Whereas, the various private interests involved can only be harmonized and included in a general and comprehensive terminal system, by substitution for same, on equitable terms, of greater advantages than now possessed, by full right to use a comprehensive

and enlarged terminal system, covering every point now reached, and that can be hereafter reached, by railroad tracks within the city limits; and,

“Whereas, the most practical means whereby conflicting interests can be harmonized, plans prepared, construction and operation can be carried on, is through establishment of a commission composed of commercial interests, where all concerned shall be fully and fairly represented.”

By Section 1 of Ordinance No. 2683, N. C. S., amending and re-enacting Section 1 of Ordinance No. 147, N. C. S. establishing the Public Belt Railroad, a new Public Belt railroad commission was created, to be composed of the Mayor of the City of New Orleans and sixteen citizen taxpayers to be appointed by the Mayor with the approval of the council, and as follows: Three members of the New Orleans Board of Trade, upon the recommendation of the New Orleans Board of Trade; two members of the New Orleans Cotton Exchange, upon the recommendation of said New Orleans Cotton Exchange; two members of the New Orleans Sugar Exchange, upon the recommendation of said New Orleans Sugar Exchange; two members of the New Orleans Progressive Union, upon the recommendation of said New Orleans Progressive Union; two members of the Mechanics, Dealers and Lumbermen's Exchange, upon the recommendation of said Mechanics, Dealers and Lumbermen's Exchange, and five members to be appointed from the citizens of New Orleans at large.

Section 2 of this ordinance, amending and re-enacting Section 2 of Ordinance No. 147, N. C. S., declared:

“That the objects and purposes of the Public Belt Commission of the City of New Orleans are, and it is, therefore, hereby fully authorized and empowered, to

acquire, own, locate, construct, control, maintain and operate, in the name of, and for the benefit of, the people of the City of New Orleans, a double-track Public Belt railway in the City of New Orleans, together with all spur tracks, switch tracks, sidings, cross-overs, locomotives, cars, depots, warehouses, shops, stations, and all other appurtenances to railway location, construction, maintenance and operation, as hereinafter described, upon a Public Belt railroad reservation, hereinafter dedicated to perpetual public use, as a Public Belt track railway reservation; and said Public Belt Railway Commission is hereby authorized and empowered, for and in behalf of the people of the City of New Orleans, to operate said Public Belt railway for the transportation of merchandise and freight in carloads, or less than carloads, and for the transportation of passengers, for such rates, charges or tariff as may be by said commission, by and with the approval of the Council of the City of New Orleans, be adopted.

"Said Public Belt Railway Commission is hereby authorized and empowered, with the consent and approval of the Council of the City of New Orleans, to transport the street sweepings and the garbage of the City of New Orleans, and any silt, deposit, sand or mud, which may result from the operation of any water plant system or systems in the City of New Orleans, to any point or points within the limit of the City of New Orleans, and to dispose of the same in such manner and for such prices as may be determined by said commission and the Council of the City of New Orleans, and also to transport all other river sand or other material which may be offered to it for transportation over said Public Belt Railway, and to

dispose of the same in such manner, and for such prices, as said commission shall determine. Said commission, with the concurrence of the Council of the City of New Orleans, shall have the right to make all lawful contracts or agreements necessary to carry out the purposes for which said commission is created. Privileges to connect private industries with said Public Belt Railroad shall be obtained from the Council of the City of New Orleans according to law. Said commission is hereby authorized and empowered to make, enforce, repeal and amend all rules and regulations covering the belting, switching and generally the movement of trains, locomotives, cars and traffic on and over said Public Belt Railroad, which shall be under the exclusive direction, control and management of said commission. Said commission is hereby authorized and empowered to issue receipts for merchandise, goods, commodities, etc., in carloads or less than carloads, accepted for transportation, and to sign and issue through bills of lading to points of destination, on such terms and conditions as may be agreed upon by said commission and connecting carriers. Said commission, by and with the consent of the Council of the City of New Orleans, is authorized and empowered to locate, construct, maintain, connect with and operate receiving stations along the line of said Public Belt Railway, independently of any switch-track connection with said Public Belt Railway, and to locate, construct, maintain and operate a main depot at a point on the river front as near to Canal Street as practicable, as may be by said commission and the Council of the City of New Orleans agreed upon. Said commission shall have power and authority to make all regulations and by-laws for

the conduct of its business as it sees fit, and to do all necessary things to accomplish its purpose and object; to employ all necessary persons and working force, and to fix all compensation and salaries. All salaries of officers and employees shall be paid from the funds of the commission."

Section 3 of this ordinance declares:

"Sec. 3. That there shall be, and there is hereby irrevocably dedicated to the people of New Orleans, for perpetual and exclusive use, as the location for a double-track Public Belt Railway, the title to which said location and said double track Public Belt Railway shall be, and shall forever be, in the people of the City of New Orleans, the following described double-track Public Belt Railway reservation—to-wit: The outer half, or river side, of the strip of ground, or neutral ground, said outer half being twenty-five feet wide in the center of the street provided for, created by and arranged in, and constructed under, Ordinance No. 15,080, C. S., now known as Leake Avenue, from the upper parish line of the Parish of Orleans to Peniston Street, said outer half, or river side, of said neutral ground from the upper parish line of the Parish of Orleans to the upper line of Audubon Park, together with the double tracks constructed thereon, and the outer half, or river side, of said neutral ground from the upper line of Audubon Park to Peniston Street, having been, by Ordinance No. 15,080, C. S., dedicated in full ownership and complete title to the City of New Orleans for perpetual public use; and a strip of ground measuring twenty-three feet wide and extending along the river front from Peniston Street to Kentucky Street,

through Kentucky Street to the rear of the city, along the rear of the city to the intersection of Hickory and Upperline Streets, and along the east side of the upper Protection Levee to its point of departure.

Section 3 of this ordinance also declares:

"That the dedication of the Public Belt double-track railway reservation hereinabove made and set forth, in so far as said reservation may traverse, cross, intersect with or encroach upon territory under the jurisdiction of the Board of Commissioners of the Port of New Orleans, shall not become final until said dedication, in so far as said territory is concerned, shall be ratified and approved by said Board of Commissioners of the Port of New Orleans."

Section 11 of the ordinance makes an appropriation to the Public Belt Railroad Commission of the City of New Orleans, thus created, of the sum of one hundred thousand dollars, made payable in installments of ten thousand dollars annually out of the reserve funds of the City of New Orleans for the years 1906, 1907, 1908, 1909, 1910, 1911, 1912, 1913, 1914 and 1915, for the purpose of owning, locating, maintaining and operating the double-track Public Belt Railroad system on the Public Belt reservation described in the ordinance, in the name of, and for the benefit of, the people of the City of New Orleans.

The last section of the ordinance is as follows:

"That all ordinances or parts of ordinances in conflict with the provisions of this ordinance be, and the same are, hereby repealed."

XIV.

PORT COMMISSION'S APPROVAL OF ORDINANCE NO. 2683, N. C. S.

On the 18th day of January, 1905, the Board of Commissioners of the Port of New Orleans adopted, (*Record, print p. 285*) without protest or objection from defendant, a resolution, approving Ordinance No. 2683, N. C. S., reciting that:

"Whereas, the Board of Commissioners for the Port of New Orleans, by resolution passed August 12, 1902, did approve the dedication of certain streets for a Public Belt railroad reservation under certain conditions and stipulations, for a Public Belt railroad to be operated and controlled by a commission in accordance with the provisions of Ordinance No. 147, N. C. S., adopted by the City of New Orleans August 7, 1900; and,

"Whereas, said resolution of this board has been sustained by a decision of the Supreme Court of the State of Louisiana as a legal exercise of power by said board; and,

"Whereas, Ordinance No. 147, N. C. S., has been altered and amended by Ordinance No. 2683, N. C. S., adopted by the Council of the City of New Orleans, October 4, 1904. The said amended ordinance is now submitted to this board for ratification and approval; therefore, be it

"RESOLVED, That the Board of Commissioners for the Port of New Orleans hereby reaffirm, under the same terms and conditions, its resolution of said date of August 12, 1912, and, therefore, approves the dedication, for the purpose of a Public Belt railroad reservation, of space for the double tracks on the river front as defined in Ordinance No. 2683, N. C.

S., in so far as same concerns the space or reservation within the jurisdiction of the said Board of Commissioners for the Port of New Orleans; *provided*, that the approval of this board shall remain in force only as long as the Public Belt Railroad is exclusively operated, managed and controlled by the Public Belt Railroad Commission, and that no rights or privileges are granted to any railroad company to control, manage and operate on said tracks.

XV.

ORLEANS LEVEE BOARD'S APPROVAL OF ORDINANCE NO. 2683,
N. C. S.

On June 17, 1905, the Board of Commissioners of the Orleans Levee District, without protest or objection from defendant, adopted a resolution (*Record, print p. 287*), of the Council in the adoption of Ordinance No. 2683, N. C. S., it having been moved that the application of the Public Belt Railroad Commission be granted, and that the permission to lay tracks in accordance with blueprints of said applicant, submitted with said application, be granted, said blueprints detailing and setting forth specifically the grade and location of the proposed tracks on the upper Protection Levee.

"It was further moved that the approval of this board shall remain in force and effect only so long as the Belt is exclusively controlled, operated and managed by the Public Belt Railroad Commission, and that no rights or privileges are granted any railroad company to control, manage and operate on said track; and provided, further, that said Belt Railroad shall be the sole property of the City of New Orleans at all times.

XVI.

FURTHER APPROVAL OF ORDINANCE NO. 2683 BY ORLEANS
LEVEE BOARD.

On the 31st of March, 1906, the Board of Commissioners of the Orleans Levee District adopted a resolution (*Record, print, p. 288*) enlarging its earlier resolution of June 17, 1905, resolving,

"That the Board of Commissioners of the Orleans Levee District hereby approves the dedication of certain space or reservation for a Public Belt Railway for the City of New Orleans, as defined in Ordinance No. 2683, N. C. S., wherever the said space or reservation is within the jurisdiction, or may be changed to be within the jurisdiction, of the Board of Commissioners of the Orleans Levee District; and also allows the use of a portion of the upper Protection Levee for railroad tracks in accordance with blueprints furnished by the said Public Belt Railroad Commission, and marked 'Commission, May 17, 1905,' said blueprints detailing and setting forth specially the grade and location of the proposed tracks on the upper Protection Levee; but the approval of the use of space or reservation, wherever the said space or reservation is within the jurisdiction of the Board of Commissions of the Orleans Levee District, is under the following terms, stipulations and reservations and: That this approval shall remain in force and have effect only as long as the Public Belt Railroad shall be exclusively operated, managed and controlled by the Belt Railroad Commission; and that the management and control of the Public Belt Railroad shall be separate and distinct from that of any railroad entering the City of New Orleans, and

no employee, director or officer of any State or interstate railroad shall be employed by or allowed to act as director, commissioner or manager of the Public Belt Railroad; and that no rights or privileges are granted to any railroad company to control, manage and operate on said tracks, and that all said tracks shall be and remain the sole property of the City of New Orleans at all times and under all circumstances, and shall be constructed on the river front within two years hereafter, and shall not be leased or alienated.

"Provided, further, that no other property under the jurisdiction of the Orleans Levee Board outside of the space reserved or used for the double tracks shall be used without the consent of the board; and the violation of any of the above stipulations shall, *ipso facto*, determine and annul all of the rights and privileges granted to the Public Belt Railroad Commission of the City of New Orleans."

XVII.

CONSTRUCTION OF PUBLIC BELT INAUGURATED.

On Saturday, July 1, 1905, a public function was held in the City of New Orleans, in celebration of the inauguration of the construction of the Public Belt Railroad, as outlined in and provided for in Ordinance 2683, N. C. S., at which the Governor of the State of Louisiana, the Mayor of the City of New Orleans, *ex officio* president of the Public Belt Railroad Commission, the president *pro tem.* of the Public Belt Railroad Commission, made commendatory addresses, and at which a golden spike, the first spike in the first rail, was driven by the Hon. Martin Behrman, then and presently Mayor of New Orleans. (*Record, print, p. 383, et seq.*)

No protest, public or private, no objection of any kind or nature whatsoever, was made by the defendant company prior to or upon this occasion.

XVIII.

DEPOSIT BY DEFENDANT.

No deposit of the fifty thousand dollars referred to in paragraph (c) of Section 3 of Ordinance No. 1997, N. C. S., had been made prior to, or was made on, this date, or was made for more than three months subsequent thereto.

It was only on the 10th day of November, 1905, that the Louisiana Railway and Navigation Company deposited with the Interstate Trust and Banking Company fifty thousand dollars in securities, a deposit of which the city has never taken any notice whatsoever. (*Record, print, p. 352.*)

XIX.

FUNDS FOR CONSTRUCTING PUBLIC BELT RAILROAD.

On March 7, 1906, the Council of the City of New Orleans, having arranged with a number of banks for the advance to it of the one hundred thousand dollars provided for belt-railroad construction by Ordinance No. 2683, N. C. S., adopted Ordinance No. 3556, N. C. S., (*Record, print, p. 280*), providing for the issue and payment of the necessary certificates of payment. The hundred thousand dollars appropriated by Ordinance No. 2683, N. C. S., thus being made available, construction work upon a larger scale was continued and was in progress by the Public Belt Commission prior to the 16th day of May, 1906.

XX.

DEFENDANT ATTEMPTS TO CONNECT WITH PUBLIC BELT.

On that date, the employees of the Louisiana Railway and Navigation Company undertook to begin, or made a pretense of beginning, the construction of a connection between the Louisiana Railway and Navigation Company's tracks above the Protection Levee with the Public Belt Railroad tracks at the Protection Levee. They were ordered by the Mayor of the City of New Orleans to desist, and, not heeding the order, were arrested, and made no subsequent attempt at construction.

On the 26th of June, 1906, the present suit was instituted by Mayor Behrman.

XXI.

ANOTHER APPROPRIATION FOR PUBLIC BELT.

On December 5, 1906, the Council of the City of New Orleans adopted Ordinance No. 4230, N. C. S., (*Record, print, p. 283*), appropriating an additional sum of \$225,000 for Public Belt Railroad construction, which sum was made available by arrangement with the leading banks and trust companies of the city.

XXII.

PUBLIC BELT BEGINS OPERATION.

On the 18th of August, 1908, the Public Belt Railroad system having been constructed by the City of New Orleans and its Public Belt Commission along the entire river front from the upper Protection Levee to Kentucky Street, with necessary spurs and switches, with interchange tracks, tracks connecting it with trunk lines and tracks con-

necting it with the various public wharves, its operation with Public Belt locomotives and equipment was begun, such operation continuing, without interruption, to the present day.

THE PLEADINGS.

This suit was instituted by the Mayor of the City of New Orleans on behalf of the city and its people.

THE PETITION.

The petition (*Record, print, p. 2 et seq.*) alleges, as matters of fact, the adoption of Ordinance No. 15,080, C. S., Ordinance No. 147, N. C. S., Resolution of the Port Commission of date August 3, 1903, Ordinance No. 1615, N. C. S., Ordinance No. 1997, N. C. S., Ordinance No. 2683, N. C. S., and Resolution of the Port Commission of date January 17, 1905, all hereinbefore recited; and, as a matter of law, alleges the illegality and nullity of Ordinance No. 1997.

It seeks to enjoin the Louisiana Railway & Navigation Company from in any manner attempting to execute Ordinance No. 1997, N. C. S., in so far as it purports to grant to said Company any rights of way or privileges to construct, maintain and operate tracks over and along a certain Public Belt railroad reservation, or to operate cars, locomotives and other equipment over and along certain Public Belt railroad tracks; from assigning or hypothecating such rights or privileges; and from impeding or attempting to prevent the construction by the City of New Orleans of Public Belt tracks, or the operation of Public Belt locomotives, cars and equipment over said Public Belt tracks; and to have Ordinance No. 1997, N. C. S., insofar as it purports to grant to said Company any rights of way on said Public Belt reservation, or to operate locomotives, cars and equip-

ment over said Public Belt tracks, declared *ultra vires*, null, void and of no effect. (*Record print*, p. 11.)

GROUND'S FOR INJUNCTION.

The grounds of the injunction (*Record, print*, p. 1 *et seq.*) are:

First, that the contract with the defendant (Ordinance No. 1997, N. C. S.) is null because it divests the people of the city of their property without due process of law, and impairs the obligation of the city's contract with the Illinois Central Railroad (Ordinance No. 15,080, C. S.), under which two miles of road were constructed; and because it stipulates something impossible, namely, the construction upon the territory of the Port Commission of a belt road which should be in some degree under the control of the railroads.

Second, that the contract with the defendant, if ever valid, has terminated, because it was subject to suspensive conditions which can never be accomplished; that as to that part of the contract by which the defendant was to have the use of the belt road down to Henderson street on paying \$50,000, the condition was that the five miles of said road from the upper boundary of Audubon Park down to Henderson street, or at least a portion thereof, should be built by the New Orleans & San Francisco Railroad Company (popularly called the "Frisco"); that as to that part of the contract by which the defendant was to be under the obligation to build said five miles of road in case the Frisco failed to do so, the condition was that the failure of the Frisco to do the work should have been without legal excuse; and that as to the contract as a whole the condition was that the defendant company should deposit with the fiscal agent of the city on April 1, 1904, \$50,000 of bonds as se-

curity for the fulfilment of the contract; that these conditions can never be accomplished because the Frisco has given up all idea of building said five miles of road and has done so with good legal excuse, and the 1st day of July, 1904, has been suffered by defendant to pass without any deposit having been made.

THE ANSWER.

The defendant filed exceptions of *res judicata* and estoppel, and, upon their being overruled, answered to the merits. (*Record, print, p. 23 et seq.*)

ARGUMENT.

DEFENDANT'S PLEA OF RES JUDICATA.

The exception of *res judicata* (*Record, p. 23*) was urged in bar of the contentions, that the contract divested the people of the city of their property without due process of law, and impaired the obligations of the contract between the city and the Illinois Central Railroad Company, and that the city was without authority to enter into the contract embodied in Ordinance 1997, N. C. S.

To this exception, plaintiff replied that, as we have seen (*ante, p. 30*), this plea was based upon the fact that while the *Capdevielle* case was pending before the Louisiana Supreme Court on application for rehearing, the attorneys of the Shreveport and Red River Valley Railroad Company filed a brief as *amici curiae*, asking the elucidation of three questions propounded in the brief, and also asking the reformation of the judgment and decree so as to pass specially on the questions thus propounded.

Defendant's plea of *res judicata*, on the face of the record, lacks every element necessary to constitute a proper plea of *res judicata*.

Article 2286 of the Civil Code of Louisiana is as follows:

"The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

In this case the thing demanded is not the same; the demand is not founded on the same cause of action, and the demand is not between the same parties.

The thing demanded in the case before the Court is a decree recognizing the validity of Section 3 of Ordinance No. 1997, N. C. S.; whereas, the thing demanded in the *Capdevielle* case was a decree recognizing the validity of Ordinance No. 1615, N. C. S. The two Ordinances are separate, different, distinct and independent grants, Ordinance 1615, N. C. S., granting certain absolute and unconditional rights to, and imposing certain absolute and unconditional obligations upon, one party; whereas, Ordinance No. 1997, N. C. S., gives certain contingent and conditional rights to, and imposes certain contingent and conditional obligations upon, another party.

The demand in this case is not founded on the same cause of action as in the *Capdevielle* case. None of the questions submitted to the Supreme Court in the *Capdevielle* case by the attorneys for the Shreveport and Red River Valley Railroad Company (*Record, print, p. 334*) are involved in the pleadings or the argument in this case.

The demand is not between the same parties. The *Capdevielle* case was a suit between the Mayor of the City of New Orleans and the New Orleans and San Francisco Rail-

road Company, a corporation organized and having its domicile in the City of New Orleans, a different entity or legal person from the defendant in this case, the Louisiana Railway and Navigation Company, a corporation created under the laws of Louisiana, and having its domicile in the City of Shreveport, Parish of Caddo.

The Louisiana Railway and Navigation Company is not the successor or assign of the New Orleans and San Francisco Railroad Company, nor has it any contractual relations with that company, and is in no sense a party privy to any grants made to it by the City of New Orleans.

The decision of the Louisiana Supreme Court in regard to this exception was as follows:

"The plea was properly overruled. *Res judicata* obtains only when the suit in which it is pleaded is between the same parties, or their successors or assigns, as the suit in which was rendered the judgment pleaded in bar; and the defendant was not a party to the Capdevielle suit, and is not a successor or assign of any party to that suit. Whatever rights it may have, or obligations it may be under, are derived wholly from the contract involved in the instant suit, which was entered into after the Capdevielle suit had terminated, and is distinct and separate from, and independent of, the contract involved in that suit. True, the defendant was to do the work called for by the Frisco ordinance, in case the Frisco failed to do it, but defendant was not to do this as an assign of the Frisco, or under, or by virtue of, the Frisco contract; but exclusively under, and by virtue of, the contract involved in the instant suit. True, also, its lawyers filed a brief as *amici curiae* in the Capdevielle suit, and the court took cognizance of the

brief; but the filing of a brief, even though the court takes cognizance of it, does not make a person a party to a suit so as to be bound by the judgment in the suit." (127 La. 793; *Record, print, p. 428.*)

DEFENDANT'S PLEA OF ESTOPPEL.

Defendant's next plea is that of estoppel. (*Record, p. 25.*)

As before stated (*ante, p. 32*), this plea is based upon the fact that the city, in her answer to the suit of the Board of Commissioners of the Port of New Orleans, alleged that the adoption of Ordinance No. 1615, N. C. S., was a valid exercise of the legislative power of the city; that the wharves and landings are public property over which plaintiff had nothing but administrative power; and that, consequently, neither the city nor the railroad company was under any obligation to ask the consent of the plaintiff to lay and operate a railroad over, along and across said property.

Plaintiff's answer to this plea is that the mere recital of the allegations of this answer force the conclusion that the allegations are allegations of *law*, and not allegations of *fact*, and that allegations of law are not proper bases for pleas of judicial estoppel. It is only an allegation of fact which judicially estops. (*Horner vs. McDonald et al., 52 An. 406*);

That, moreover, the allegations made by the city in the *Port Commission case* were unsuccessfully pleaded; and it is familiar jurisprudence that parties are not estopped by pleadings unsuccessfully made. (*Godwin vs. Neustadt, 47 An. 850, 851*);

That a declaration made in a judicial proceeding which is an illegal deduction from facts, and is corrected by the Court, cannot serve as a foundation for the plea of estoppel in a subsequent suit. (*Stockmeyer vs. Oertling*, 38 An. 100); and

That defendant's plea of judicial estoppel, therefore, has no better foundation, and is entitled to no greater consideration than its plea of *res judicata*.

The decision of the Louisiana Supreme Court on this question was that "a party is not estopped by allegations of law unsuccessfully made in a former suit." (127 La., 794; *Record, print*, p. 428).

The defendant's plea of estoppel is also based upon the alleged fact that upon the faith of the ordinance whose validity is now assailed the defendant expended large sums of money in constructing its road into New Orleans, as required by the ordinance. (*Record, print*, p. 27).

The plaintiff's answer to this ground of estoppel is that, in the first place, the city is not assailing the validity of the entire ordinance, but only of that part of it relating to the belt railroad; that the other parts, making valuable grants and concessions to the defendant, of which the defendant is to-day in the full enjoyment, are not assailed; and, in the second place, that the part of the ordinance relative to the belt road spoke for itself, and that if defendant has put an erroneous interpretation upon it and chosen to act upon that interpretation, defendant has but itself to blame.

And such was the decision of the Louisiana Supreme Court. (127 La. 794; *Record, print*, p. 428).

ON THE MERITS.

Coming now to the merits of this cause, we wish, before considering the various grounds of injunction, to bring the Court's attention to the distinction between the two belt railroad systems contemplated by the ordinances involved in this litigation.

TWO BELT SYSTEMS DISTINGUISHED.

The belt railroad system contemplated by Ordinance No. 15,080, C. S. (the Illinois Central ordinance), and outlined in Ordinance No. 147, N. C. S. (the ordinance establishing the *Public Belt Railroad system of the City of New Orleans*), is radically different from the belt railroad system provided for by Ordinance No. 1615, N. C. S. (the Frisco ordinance), and Ordinance No. 1997, N. C. S. (the L. R. & N. ordinance, at issue herein).

The two latter ordinances embody a scheme for the construction of a belt railroad system through the agency of the railroads for whose use the same is intended and by means of contributions from them.

The Frisco ordinance provides that the Frisco, or New Orleans & San Francisco Railroad Company; shall construct, at its own expense, five miles of road, continuing down to Henderson Street two miles of road already constructed by the Illinois Central, in consideration of which it shall have the use of the belt, with the right to operate thereon its own locomotives, cars and equipment; that an account shall be kept of the cost of this construction, and that every railroad contributing an amount at least equal shall have the right to use the belt in the same way. The belt railroad system here planned is a (*so-called public*) belt railroad system over which the railroad companies, in consideration of construct-

ing parts of the system, shall have the right to operate their own locomotives, cars and equipment—nothing but a line of double track over which the railroad companies may operate on an equal footing with the *Public Belt Railroad* established by Ordinance No. 147, N. C. S. The railroad companies are made perpetually full partners with the public in the use of the public tracks. On the other hand, the belt railroad system contemplated prior to the adoption of the Frisco ordinance is a *public belt railroad system*, exclusively owned, controlled and administered by public authority—a system of double public tracks over which none but public belt railroad equipment may operate at any time or under any condition. The public are to have no partners in this system.

True, under the system contemplated by the Frisco ordinance, the title to the tracks to be built by the railroad companies is to be vested in the city, but this only relieves the companies from paying taxes on the tracks.

True, also, that the Frisco ordinance purports to vest, after July 1, 1907, the sole control and management of the tracks in the Public Belt authorities of the City of New Orleans; but this sole control and management is subject to two important restrictions: First, the Public Belt Railroad authorities shall exercise control without discrimination against the cars, *trains* and traffic of said company; and, second, the city is bound forever to submit all controversies between the Frisco, *on the one side*, and the city and her Public Belt officials, or any company or companies to which the city or her Public Belt officials might grant the use of said tracks and appurtenances, *on the other side*, relative to the use of said tracks and appurtenances, or to the cost of construction or maintenance thereof, or to the rules and regulations relative to the movement and the handling of cars, trains or traffic thereon and thereover, to arbitra-

tion, wherein the Frisco, by itself, is to appoint, and be represented by, one arbitrator, while the city and the Public Belt officials, and all other railroads to which might be granted the right to use the tracks, are, collectively, to appoint, and be represented by, only one arbitrator, the two arbitrators thus chosen to select, in case of disagreement, a third arbitrator, and the decision of a majority of the members of this tribunal to have the effect of an amicable composition.

The ordinance thus gives to the grantee joint control with the public in the administration of the *so-called public belt system*.

Ordinance No. 147, N. C. S., establishing the *Public Belt Railroad system*, however, by Section 8, declares

"That the management and control of the *Public Belt Railroad* shall be separate and distinct from that of any railroad entering the City of New Orleans, and shall remain forever the property of the City of New Orleans; and no employee, contractor or officer of any State or interstate railroad shall be employed by or allowed to act as director, commissioner or manager of the *Public Belt Railroad*."

This ordinance contemplates exclusive control and administration by the public for the benefit of all railroads and the public in general, and does not contemplate a joint control or administration with the Frisco, or any other railroad company obtaining a similar grant. It does not contemplate a control and administration that will be hampered by controversies arising between it and railroads using the tracks for their "locomotives, cars and equipment," which can only be decided by an arbitration commission where the Frisco, for its own interest, can appoint one arbi-

trator, and the Public Belt authorities, for the interest of all other railroads and the public in general, can appoint but one arbitrator.

The system established by Ordinance No. 147, N. C. S., the Public Belt Railroad system of the City of New Orleans, is the system approved by the Port Commission. (*Ante*, p. 24).

The system established by Ordinances No. 1615, N. C. S., and No. 1997, N. C. S., is another and different system, not approved by the Port Commission.

The difference between the two systems is recognized by the Supreme Court of Louisiana in the *Capdevielle case* (*ante*, p. 29), the court, however, holding that the city was legally competent to change the plan first had in view; and in the *Port Commission case* (*ante*, p. 30) the Court holds that paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S. (the Frisco ordinance), is inoperative, because it is not the same as that which has received the approval of the Port Commission (Ordinance No. 147, N. C. S.), and because it has not received such approval.

Counsel for defendant have sought to show a difference between the two ordinances in regard to the control and management of the so-called *public belt line* for the sake of their argument that, while paragraph 10 of Section 2 of Ordinance 1615, N. C. S., provides for one kind of belt system which is at variance with the system outlined in Ordinance No. 147, N. C. S., and approved by the Port Commission, Section 3 of Ordinance No. 1997, N. C. S., provides for another kind of belt system, which is not at variance with the system outlined in Ordinance No. 147, and is in harmony with the conditions upon which the Port Commission's approval of Ordinance No. 147 was given.

The system devised by Ordinance No. 1615, N. C. S., however, is expressly declared in Ordinance No. 1997, N. C. S., to be the system which the Louisiana Railway and Navigation Company is to create in case the latter grant should become effective by the happening of the events forming the bases of the conditions contained in the grant, the only difference being as to the time when the city should have such control as the ordinance allowed.

This difference in time is of no importance. The suspension for three years by Ordinance No. 1615, N. C. S., of the control of the public authority over the *so-called public belt* does not appear to have received any special attention in the *Port Commission case*. One thing is certain: The Supreme Court did not render its decision in that case solely or specially, if at all, because of this difference of time.

Counsel for defendant further contend that Ordinance No. 1997, N. C. S., gives to the City of New Orleans and the Public Belt authorities greater title, control and management of the tracks to be built by it than is given by Ordinance No. 1615, N. C. S., of the tracks to be built by the Frisco. This is error. The measure of ownership and control given by Ordinance No. 1997, N. C. S., is identical with that given by Ordinance No. 1615, N. C. S. Both ordinances contain the same provisions for the vesting in the City of New Orleans of the ownership of the tracks to be built, and the vesting in the Public Belt authorities of the control and management of the track, and contain the same limitations upon the control and management of the tracks.

Paragraph (f) of Section 3 of Ordinance No. 1997, N. C. S., provides for an arbitration similar to that provided in subdivision (f) of paragraph 10 of Ordinance No. 1615, N. C. S.:

"All controversies between the Louisiana Railway and Navigation Company, on the one side, and the Public Belt authority, or any other company or companies to which the city or her Public Belt authority may grant the use of said tracks and appurtenances, on the other side, relative to the use of said tracks and appurtenances, or the cost of construction or maintenance thereof, or the rules and regulations relative to the movement and handling of cars, trains and traffic thereon and thereover, shall be submitted to the arbitration of three disinterested persons—one to be selected by said Louisiana Railway and Navigation Company, the second by the Public Belt authority, or such company or companies, as the case may be, and the third by the two thus chosen; and the decision of this tribunal, or any two of them, shall have the effect of an amicable composition."

Paragraph (j) of Section 3 of Ordinance No. 1997, N. C. S., contains the same inhibition against any discrimination by the Public Belt authorities against the *trains, cars* traffic of the defendant company as is contained in subdivision (h) of paragraph 10 of Section 2 of Ordinance No. 1625, N. C. S.

There is, however, a difference, though one of little moment, between these ordinances as to the date when the limited ownership and control is to be vested in the public.

By subdivision (j) in paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S. (the Frisco ordinance), such control and management of the belt tracks was to revert to the public authorities when the *so-called public belt* was entirely completed to Clouet Street; but, if the *so-called public belt* was not completed to Clouet Street by July 1, 1907, then the control and management was to revert to the public authorities on July 1, 1907.

As the Frisco was bound to complete its tracks to Henderson Street on or before July 1, 1904, such control by the railroad company as Ordinance No. 1615, N. C. S., vested in it was to endure for three years from July 1, 1904, to July 1, 1907.

By paragraph (c) of Section 3 of Ordinance No. 1997, N. C. S. (the L. R. & N. ordinance), the Louisiana Railway and Navigation Company was to complete the tracks to Henderson Street within one year from the time the city should furnish the clear and undisputed right of way. The management of the tracks under Ordinance No. 1997, N. C. S., which was the same control and management proposed by Ordinance No. 1615, N. C. S., was to vest in the public when the tracks were completed to Henderson Street.

The only difference between the defendant's ordinance (No. 1997, N. C. S.) and the Frisco ordinance (No. 1615, N. C. S.) is that the Frisco was to have complete control and management for three years after the tracks were built, whereas the defendant company was to surrender such control and management as its ordinance gave as soon as the tracks were built.

FIRST GROUNDS OF INJUNCTION.

The first grounds of injunction (*ante*, p. 56) set up in the petition were not pressed by plaintiff, for they had already been considered and passed upon by the Louisiana Supreme Court in the Capdevielle and Port Commission cases. (*Ante*, pp. 29 and 30).

SECOND GROUND OF INJUNCTION.

Plaintiff relied and insisted upon the second ground of injunction, viz., that Ordinance No. 1997, N. C. S., was null because it was subject to suspensive conditions which can

never be accomplished (*ante*, p. 56) ; and it was upon this second ground that the Louisiana Supreme Court founded its decision.

The argument of the plaintiff upon this point covered the matter thoroughly, and may be reproduced as follows:

By Ordinance No. 15,080, C. S., the Illinois Central Railroad Company was obligated to construct for the City of New Orleans, as part of the line of the public belt railroad system the city intended to establish, and along the neutral ground of a street or reservation on the river front of the city, dedicated to that use and purpose, two miles of double track, from the upper limits of the city (Protection Levee) to the upper line of Audubon Park. These two miles of double track were duly constructed. Later, by Ordinance No. 1615, N. C. S. (devising a new *so-called* public belt railroad system), the New Orleans & San Francisco Railroad Company, or Frisco, was, among other things, obligated to construct about five miles more of double track, extending the tracks already constructed by the Illinois Central from the upper park line down to Henderson Street; and said company was, also, by said ordinance, granted, upon certain terms and conditions, a right of way "over the double track belt line and reservation on the river front of the City of New Orleans from the upper limits of the city to Henderson Street."

Now, by Section 3 of Ordinance No. 1997, N. C. S., above quoted, the Louisiana Railway and Navigation Company, defendant-appellant in this cause, was granted

"a right of way over the double track belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson Street,"

upon certain terms and conditions, which will now be discussed.

CONDITIONAL GRANT UNDER PARAGRAPHS (A) AND (B).

The first of these terms (paragraphs "a" and "b," *ante*, p. 33), provided that when the Louisiana Railway and Navigation Company should have operated its engines, trains and cars over said belt tracks (*i. e.*, the tracks constructed by the Illinois Central, and the projected tracks to be constructed by the Frisco), for a period of thirty days, it should then pay to the city the sum of \$50,000 *to be used for the extension, equipment and operation of the belt railroad system*, and in consideration of such payment should have the right to operate its own locomotives, cars and equipment over the said belt railroad from the upper limits of the city to Henderson Street; but, before beginning to operate, it was to deliver to the fiscal agent of the city securities to the value of \$50,000 as security for the payment, at the time fixed, of \$50,000 in money, the securities to be returned to the company if, for any reason, it should not have, or be accorded, the right to operate its engines, trains and cars over the belt tracks.

It is clear that this grant is made upon the condition precedent that the said projected tracks should be constructed by the Frisco.

The City of New Orleans had, by Ordinance No. 1615, N. C. S., agreed with the Frisco that it should have a joint use with the city of the two miles of double track already built and belonging to the people, and of a belt reservation already dedicated to and belonging to the people, provided that the company constructed five miles more of double track extending the *so-called public* belt railroad system outlined in its ordinance as far down the river as Henderson Street;

and, when it adopted Ordinance No. 1997, N. C. S., it was dealing with this *so-called public belt* system and granting the defendant, the Louisiana Railway and Navigation Company, the right to operate its engines, trains and cars over this *so-called public belt* railroad only if and when it should be constructed by the Frisco. The city had not made an ordinary contract for the construction of railway tracks, but it had granted a *franchise* to the Frisco to operate its engines, trains and cars over public tracks and public highways from the upper limits of the city to Henderson Street in consideration that the Frisco would build the tracks of the *so-called public belt* provided for in its grant from the upper park line down to Henderson Street.

When, after adopting Ordinance No. 1615, N. C. S., the city adopted Ordinance No. 1997, N. C. S., it granted a new, additional and independent franchise to the defendant to operate its engines, trains and cars over the *so-called public belt* system. The grant to the defendant to operate over this system was necessarily a grant which was only to take legal effect when the said system should be constructed. It was a grant to take effect upon the happening of an uncertain event. Until the event happened, no right existed; if the event never happened, no right arose. It was a conditional grant, and the condition was suspensive.

The Frisco *did not build* the *so-called public belt* line outlined in Ordinance No. 1615, N. C. S., and the grant made by paragraphs (a) and (b) of Section 3 of Ordinance No. 1997, N. C. S., to defendant to operate its engines, trains and cars over this *so-called public belt* line never took effect.

One of the learned counsel for the defendant, recognizing the correctness of this statement, very frankly admitted in argument in the court of the first instance (Civil District

Court, Parish of Orleans) that, as the grant to the defendant was to operate over the *so-called public belt line* to be built by the Frisco under Ordinance No. 1615, N. C. S., and the Frisco had not built the line, the question of whether the defendant had any rights under paragraphs (a) and (b) of Section 3 of Ordinance No. 1997, N. C. S., was eliminated from the cause.

CONDITIONAL GRANT UNDER PARAGRAPH (C).

By the second term of Ordinance No. 1997, N. C. S. (paragraph "c," *ante*, p. 34), the Louisiana Railway and Navigation Company (defendant herein) was granted an alternative right; that, in the event of the Frisco, its successors or assigns, failing, *without legal excuse*, to build said belt tracks, from the upper side of Audubon Park to Henderson Street, on or before July 1, 1904, defendant was to build the same under the terms and conditions of paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.; and, in case defendant so built said tracks,

"it is hereby granted the right and privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of said paragraph 10 of Section 2 of Ordinance 1615, N. C. S."

This alternative grant, like the grant made by paragraphs (a) and (b) of Section 3 of Ordinance No. 1997, N. C. S., was made to depend on an uncertain event—the failure of the Frisco, its successors or assigns, *without legal excuse*, to build the belt tracks referred to in Ordinance No. 1615, N. C. S., from the upper side of Audubon Park to Henderson Street, on or before July 1, 1904. This grant was not a grant *in praesenti*, giving to defendant an absolute right to build tracks from the upper side of Audubon Park to Henderson Street in order that it might operate its engines,

trains and cars over such tracks, but it was a grant to take effect in the future, and only in case the Frisco, which had been granted a prior and absolute right to operate over the tracks, failed to build them *without legal excuse*. The grant was not to take effect until the event happened. If the event never happened, the grant was never to take effect, because the condition was suspensive.

The defendant was, in the case of the failure, *without legal excuse*, of the Frisco, to build the belt tracks from the upper side of Audubon Park to Henderson Street, and, in case the defendant built such tracks, it was to have the right and privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., the defendant company assuming all the obligations and obtaining all the rights and privileges of the Frisco under said paragraph of said ordinance. The defendant was to pay the cost of constructing the tracks from the upper side of Audubon Park to Henderson Street in lieu of the payment of the fifty thousand dollars referred to in paragraph (a) of Section 3 of Ordinance No. 1997, N. C. S.; it was to build the tracks to Henderson Street within one year from the time the city should furnish it a right of way; and, as soon as the tracks were completed to Henderson Street, it was to turn over the same to the immediate ownership of the city, to be under the control and management of the Public Belt authorities.

The defendant company was also required to deposit on July 1, 1904, with the fiscal agent of the city bonds to the value of fifty thousand dollars as security for compliance by the company with these obligations, the bonds to be returned when the obligations were performed.

That the grant to defendant of the right to build the belt tracks from the upper side of Audubon Park to Henderson Street, so that it might operate thereon, was entirely contingent upon the failure, *without legal excuse*, of the Frisco to build these tracks before July 1, 1904, is made even more certain by the further language of said paragraph (c). This paragraph specially provides:

"That, in case said company shall be prevented from building said tracks, or any portion of the same, on account of the city not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited to secure its obligations shall be returned to it by the said fiscal agent."

And, further:

"That nothing in this ordinance or in this section or clause shall be construed as a waiver or abandonment of the rights that the City of New Orleans now has, or may hereafter have, under and by virtue of the provisions of the Ordinance 1615, N. C. S.; and, provided, further, that nothing in this ordinance, section or clause shall be construed to relieve the New Orleans & San Francisco Railroad Company, its successors or assigns, from any of its obligations to the City of New Orleans arising from the provisions of Ordinance No. 1615, N. C. S., and especially under paragraph 10 of Section 2 of said ordinance; it being distinctly understood and declared that the city shall be entitled to enforce all its rights under said Ordinance 1615, N. C. S., precisely as if this present ordinance had not been passed at all."

If the city was unable to furnish the right of way which it had agreed by Ordinance No. 1615, N. C. S., to furnish

to the Frisco, and which it had also agreed by Ordinance No. 1997, N. C. S., to furnish the defendant in case the Frisco failed to build the tracks from the upper side of Audubon Park to Henderson Street, *without legal excuse*, on or before the 1st day of July, 1904; or if the defendant was prevented from building the tracks by causes beyond its control, then defendant was to be relieved from all obligations, and its deposit of securities was to be returned to it.

The city, in making the grant to defendant to build the tracks from the upper side of Audubon Park to Henderson Street in case the Frisco failed to build them, *without legal excuse*, on or before July 1, 1904, expressly declared that nothing in defendant's ordinance should be construed as a waiver or abandonment by the city of, or a release of the Frisco from any of the rights that the city had, or might have, against the Frisco under Ordinance No. 1615, N. C. S., but that the city should be entitled to enforce all its rights under Ordinance No. 1615, N. C. S., precisely as if Ordinance No. 1997, N. C. S., had never been adopted.

It is perfectly clear that, as the city had made the first grant to the Frisco to build the *so-called public belt line* from the upper side of Audubon Park to Henderson Street, in order to operate its engines, trains and cars over the *so-called public belt* system from the upper limits of the city to Henderson Street, it did not, when it adopted Ordinance No. 1997, N. C. S., intend to give to defendant any more than it had given to the Frisco. The grant to the Frisco was an absolute grant to build the tracks and operate over the *so-called public belt* upon certain terms and conditions. The grant to defendant was a subsequent, conditional and alternative one—first, to operate its engines, trains and cars over the tracks to be built by the Frisco if they were built; and, in case they were not built by the Frisco and the fail-

ure to build was *without legal excuse*, then to build the tracks and to operate over the so-called *public belt line*.

If the grant made by the city to the Frisco was invalid, the contingent grant made to defendant was also invalid.

It is true that, when defendant's ordinance was adopted, the decision of the Louisiana Supreme Court in the *Capdevielle case*, sustaining Ordinance No. 1615, N. C. S. (the Frisco ordinance), had been rendered; but it is also true that the *Port Commission case*, also involving the validity of Ordinance No. 1615, N. C. S., was then pending, and the reason why the alternative grant to defendant to build tracks from the upper side of Audubon Park to Henderson Street was made dependent upon the failure of the Frisco to build these tracks, *without legal excuse*, was to deal fairly by the Frisco, there being no intention on the part of the city to give any right to defendant if no right had been given to the Frisco.

The decision of the Supreme Court of Louisiana in the *Port Commission case* (that the portion of the ordinance in question, paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., was inoperative *ante*, p. 32), was, of course, *legal excuse* for the Frisco not to build the double tracks required to be built by Ordinance No. 1615, N. C. S., from the upper park line to Henderson Street, and the Frisco abandoned the project contemplated by it, and the city, when Ordinance No. 1615, N. C. S., was adopted, of constructing the so-called public belt line provided for by that ordinance between the upper park line and Henderson Street. Both parties to the contract, and everybody else, including, as it would appear by their subsequent inaction, the defendant itself, considered the matter at an end.

The Frisco was thus released from its obligation to con-

struct tracks between the upper park line and Henderson Street, and the city was thus released from its obligation to accord the Frisco the right to operate its locomotives, trains and cars over the *so-called public belt* tracks between the upper limits of the city and the upper park line and over the public reservation, upon which the Frisco was to have built tracks, from the upper limits of the city to Henderson Street.

The Frisco failed to build the track from the upper side of Audubon Park to Henderson Street, but it failed with legal excuse. It *did not fail without legal excuse*, and, therefore, the grant made by paragraph (c) of Section 3 of Ordinance No. 1997, N. C. S., to defendant, the Louisiana Railway and Navigation Company, to build said tracks and to operate its trains, cars and traffic under the provisions of paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., never took effect.

CONDITIONAL GRANT UNDER PARAGRAPH (D).

Paragraph (d) of Section 3 of Ordinance No. 1997, N. C. S., gave to defendant another contingent right (incidental to the contingent right given in paragraph "a" to operate over the *so-called public belt* railroad line to be built by the Frisco, under Ordinance No. 1615, N. C. S., in case this belt line was so built), to-wit: in the event that the Frisco should, from any cause, complete only a portion of the tracks from the upper side of Audubon Park to Henderson Street, the Louisiana Railway and Navigation Company was to have the right to operate its locomotives, cars and equipment over the *so-called public belt* tracks between the upper limits of the city and the upper park line, and over such additional tracks as might be built by the Frisco, the company paying for the privilege such proportion of

the fifty thousand dollars provided for in paragraph (a), as the tracks so constructed by the Frisco, and used by said defendant company, might bear to the whole length of the tracks from the upper limits of the city to Henderson Street.

Paragraph (d) does not grant to defendant the right, under any contingency, to build tracks or to operate over any tracks it may build. It only gives it a right to *use*, for a consideration, such portion of the tracks outlined in Ordinance No. 1615, N. C. S., as might be built by the Frisco before the Frisco was prevented, *by legal excuse*, from completing the *so-called public belt line* from the upper park line to Henderson Street.

This grant, like the grant covered by paragraph (a) of the section, never took effect for the simple reason that the Frisco never built *any* tracks at all, and never was obliged by Ordinance No. 1615, N. C. S., to construct any less extent of tracks than from the upper side of Audubon Park to Henderson Street, the grant to the Frisco of the right to construct the *so-called public belt line*, devised by Ordinance No. 1615, N. C. S., being an indivisible grant, both as far as the City of New Orleans was concerned and as far as the Frisco was concerned.

INDIVISIBILITY OF THE GRANT.

Counsel for defendant contend that the grant to the Frisco to build tracks between the upper line of Audubon Park and Henderson Street was a divisible grant, under which the Frisco might build all or only such portion of the tracks for which the city was legally capable of furnishing a right of way, and they claim that their contention is supported by the decision of the Louisiana Supreme Court in the *Capdevielle case*, in the following language:

“The city has not bound itself hard and fast for

a stated consideration to furnish this right of way. She transferred the right she was authorized to transfer; that is, the right she owns and controls. If she did not have the authority, she did not transfer the right. As between the city and defendant, she is bound in good faith to carry out the terms of the ordinance."

This language does not mean that by Ordinance No. 1615, N. C. S., the Frisco was obliged to construct a part of the *so-called public belt* system, even if the city was legally incapable of granting the through right of way from the upper limits of the city to Henderson Street. This would have been manifestly unjust. What the Frisco desired and contracted for was a *so-called public belt* system down to Henderson Street; and, if it was prevented from constructing any part of it, the balance was useless.

Nor does this language mean that if, as it subsequently appeared, the city did not have legal authority to grant the through right of way from the upper limits of the city to Henderson Street—the object that the city had in contemplation—the city must accept and be satisfied with the construction by the Frisco of parts or patches of railway tracks between the upper line of Audubon Park and Henderson Street.

What the Supreme Court meant was that the question of the Port Commission's jurisdiction was not a question to be raised between the city and the Frisco; that the city was bound as far as she had legal authority, and that the question of whether the ordinance required other official approval was not a question for the city to raise. The Court did not intend to convey the idea that, if the grant made by the city was, in whole or in part, an illegal or unauthorized

grant, the Frisco was obliged to take, or the city to give, or *vice versa*, only part of what the grant conveyed.

There is not a word in any part of Ordinance No. 1615, N. C. S., to indicate that, either as to the Frisco or as to the city, the grant to construct for use the *so-called public belt system*, devised by that ordinance, was a *divisible grant*, and there is not a word in any part of Ordinance No. 1997, N. C. S., to indicate that, as between the defendant company and the city the contingent grant to it to construct and use the *so-called public belt system*, devised by Ordinance No. 1615, N. C. S., is a *divisible grant*.

The proviso in paragraph (c) of Section 3 of Ordinance No. 1997, N. C. S., that, if the company shall be prevented from building the belt tracks, "or *any* portion of the same, on account of the city not furnishing the right of way, under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by the said fiscal agent," does not indicate that the alternative right granted to the company to build and use the tracks from the upper park line to Henderson Street was divisible, as defendant's counsel contend, but indicates just the contrary, because it relieves the company from all the obligations imposed by paragraph (c) of the ordinance in case it is prevented from building "*any* portion of the tracks." If the company was to be relieved from all its obligations under paragraph (c), in case the city could not furnish a right of way for *any* portion of the tracks, then the ordinance was *indivisible* as to the company, and, if it was indivisible as to the company, it was indivisible as to the city.

ENTIRE EXTENT OF PORT COMMISSION'S JURISDICTION NOT
JUDICIALLY DEFINED.

In connection with their argument that the grant made by Ordinance No. 1615, N. C. S., to construct the *so-called public belt* system was a *divisible* grant, defendant's counsel assert that in the *Port Commission* case the Supreme Court of Louisiana fixed and defined the entire extent of the territory along the river front between upper Protection Levee and Henderson Street over which the Port Commission has jurisdiction, and decided that the Port Commission has no jurisdiction of any part of the territory above Toledano Street referred to in paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.

This is an error into which defendant's counsel fall in seeking to secure some foundation for the claim that Ordinance No. 1615, and, consequently, Ordinance No. 1997, are valid ordinances in so far as they deal with tracks above Toledano Street; and that, therefore, defendant should be allowed to operate over the *Public Belt system* to Toledano Street or to Willow Grove Landing.

The Supreme Court, however, only decided that paragraph 10 of Section 2 of Ordinance No. 1615 was invalid because certain portions of the territory dealt with by it below Toledano Street were shown to form part of the then improved public landings, and were, therefore, clearly within the control of the Port Commission. The Court did not decide, or intend to decide, that the Port Commission had no jurisdiction of any of the territory referred to above Toledano Street. This would have been to divest the Port Commission of the authority given it by the statute creating it (Act No. 70 of 1896) and the statute amendatory thereof (Act No. 36 of 1900), to construct and establish new

wharves and landings whenever and wherever needed in the Parishes of Orleans, Jefferson and St. Bernard.

It was unnecessary for the purposes of the decision of the *Port Commission case* for the Supreme Court to enter into an inquiry as to what the entire scope of the Port Commission's actual and potential jurisdiction might be, and the Court did not undertake such an investigation.

It sufficed that the city undertook, by paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., to make a grant over territory below Toledano Street then actually forming part of the public wharf and landing system; that the Port Commission did not approve this grant, and the grant was, therefore, void.

The grants made by Ordinance No. 1615, N. C. S., and Ordinance No. 1997, N. C. S., are *indivisible*; the Port Commission decision does not extend as far as defendant would like to draw it, and there is no porfit in further discussion of these matters:

CITY AND FRISCO ACCEPT PORT COMMISSION DECISION AS CONCLUSIVELY EXTINGUISHING THEIR RIGHTS.

There is no doubt as to the fact that the city and the Frisco accepted the decision of the Louisiana Supreme Court in the *Port Commission case* as conclusively extinguishing the rights and obligations of both parties under Ordinance No. 1615, N. C. S. (the Frisco ordinance).

The Council of the city, by the adoption of Ordinance No. 2683, N. C. S., publicly declared its acquiescence in the annulment of paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S. (the Frisco ordinance), and avowed its purpose to revert to, enlarge and improve upon, and to construct and put in actual operation, the *Public Belt Railroad system*

contemplated at the date when Ordinance No. 15,080, C. S. (Illinois Central Railroad ordinance), was adopted, and first definitely outlined in Ordinance No. 147, N. C. S., establishing said *Public Belt Railroad* system.

The Council of the City of New Orleans by this ordinance created a commission upon which every business interest in the city was represented; it marked off and dedicated a complete right of way around the entire city; it created the necessary officers and provided for the necessary employees to construct, maintain and operate a complete, improved and modern system for the belting or switching of cars to and from all points in the city, and it provided, in addition to the funds which had been previously appropriated, the sum of one hundred thousand dollars to meet the cost and expenses contemplated. It made perpetual dedication of the right of way and of the entire system to the people for public use and benefit in terms clear and explicit.

Ordinance No. 2683, N. C. S., did more than this. It expressly repealed all ordinances or parts of ordinances in conflict with any of its provisions.

It was adopted without objection or protest from the defendant, which had not even made, at the date of its adoption, the deposit of fifty thousand dollars required by paragraph (c) of Section 3 of Ordinance No. 1997, N. C. S., a deposit which was to have been made before any performance could be had or any obligation could arise under that ordinance.

One of the effects of the repeal by Ordinance No. 2683, N. C. S., of Ordinance No. 1997, N. C. S., as one of the ordinances parts of which were in conflict, undoubtedly was to render legally impossible the deposit of fifty thousand dol-

lars by the defendant as a basis for any rights it might thereafter claim under Ordinance No. 1997, N. C. S.

DEFENDANT ALSO REGARDED THE PORT COMMISSION CASE AS
DECISIVE.

There is equally no room for doubt that the defendant also accepted the decision of the Supreme Court as estinguishing the rights and obligations of the parties. Ordinance No. 2683, N. C. S. (*ante*, p. 42), and the resolutions of the Board of Commissioners of the Port of New Orleans (*ante*, p. 49), and of the Orleans Levee Board (*ante*, p. 50) approving said ordinance, were adopted without protest or objection from said company; and the public function celebrating the inauguration of the construction of the *Public Belt Railroad* (*ante*, p. 52), was held without any protest or objection of any kind or nature whatsoever from defendant. It continued silent and acquiescent for seventeen months. It was only on the 10th day of November, 1905, that the said company deposited the fifty thousand dollars in securities (*ante*, p. 53), a deposit of which the city has never taken any notice whatsoever; and it was not until some time after the city had made other provision for the construction of the belt that the defendant set up the present pretensions, "which," says the Louisiana Supreme Court, "wear very much the appearance of an after thought." On May 16, 1906, employees of the defendant company began the construction of a connection between its tracks and those of the *Public Belt Railroad*. They were arrested, and made no subsequent attempt at construction. Thereafter, on June 26, 1906, the present suit was instituted.

In this suit the defendant filed a petition for a judicial sequestration of the public belt reservation, which was de-

nied. Later they filed a petition foroyer of all the ordinances referred to in plaintiff's petition, which was also denied. On November 5, 1906, defendant was by order of court given ten days within which to file answer to plaintiff's petition. Nothing further was done in this case, however, for a period of nearly two years.

DEFENDANT INACTIVE DURING CONSTRUCTION OF PUBLIC BELT
RAILROAD.

In the meantime the *Public Belt Railroad* had been constructed, and on August 18, 1908, its operation was begun.

On the 25th day of August, 1908, an agreement was entered into between the city and its Public Belt Railroad Commission and the Louisiana Railway and Navigation Company (*Record, print, p. 291*), under which a connection was made between the *Public Belt* tracks and the defendant's tracks at the upper Protection Levee, and the business of the defendant has since been handled by the Public Belt Railroad Commission.

(This agreement was entered into temporarily, and was to be continued until the instant case is finally decided, or until dissolved by either party after ten days' notice, and the agreement was in no way to affect the rights of either of the litigants or any of the parties under Ordinances Nos. 1615 and 1997, N. C. S.).

On October 8, 1908, the defendant filed the exceptions and answer presently considered.

It is important in this connection to note that, when the defendant company was prevented by the Mayor, on May 16, 1906, from making the attempted connection between its tracks and the *Public Belt Railroad* tracks, the company did not apply to the Court for an injunction restraining the

city from interfering with its execution of Ordinance No. 1997, N. C. S., but that, on the contrary, the suit was instituted by the Mayor on behalf of the city and its people, and the preliminary writ of injunction was issued without objection on the part of the defendant company.

It is also important to note that no move of any kind was made by the defendant company in this case between the date when their prayer foroyer was overruled, November 5, 1906, and the date when they filed their exceptions and answer, October 8, 1906, a period of nearly two years, during which time the *Public Belt Railroad system*, with its connections, was completed and placed in actual operation.

Defendant's counsel say that this inaction on their part signifies nothing; that it was the plaintiff upon whom the responsibility for inaction in the cause rested. Why this should be so does not appear, as the plaintiff, having obtained, without objection, a preliminary writ of injunction restraining the defendant from interfering with the construction and operation of the *Public Belt Railroad system*, could afford to proceed with the construction and operation of the system and wait until the final judgment day for a final judgment.

Defendant's counsel also endeavored to show, as a reason for their inaction, that there were, during this time, negotiations always pending between the defendant company and the city for a settlement or compromise of the matters at issue. The record, however, shows only such negotiations immediately prior to the institution of the suit and immediately prior to the making of the temporarily agreement of August 25, 1908, and does not account for the period between the judgment overruling the prayer foroyer and the filing of the exceptions and the answer, during which, as a fact, there were no negotiations.

If the defendant company had any rights, under Ordinance No. 1997, N. C. S., after the decision of the *Port Commission case*, and after the adoption of Ordinance No. 2683, N. C. S. (reorganizing the Public Belt Railroad Board), it behooved it to assert and establish such rights before the City constructed, with public moneys duly appropriated, and advanced by the leading banks and trust companies of the city upon the faith of the city's credit, a complete public belt railroad along the river front, and before the Public Belt Railroad Commission organized its force and placed its system in operation.

Counsel for defendant may content themselves with the thought that, as the city had enjoined defendant from interfering with it in its construction and operation of its *Public Belt Railroad system*, and had asked the courts to declare Section 3 of Ordinance No. 1997, N. C. S., void and of no effect, the defendant was not called upon to take any action to have this injunction set aside, or to have the cause decided adversely to the city, but could sit quietly down, doing nothing, and with full knowledge of the progress of the city's work, until a new status of affairs had been created. It will be plain, however, to other minds that defendant's present demands are stale.

Another theory advanced by defendant's counsel is that, as the defendant was enjoined from construction, the city's construction must be considered the defendant's construction, and the city held to be a legal trustee for the defendant, its acts enuring to defendant's benefit.

It is impossible, however, to conceive the city as a legal trustee for defendant in connection with the construction of the existing *Public Belt system* in view of the contingent and conditional character of defendant's grant, the

difference between the *Public Belt system* provided for by Ordinances Nos. 147 and 2683, N. C. S., and the belt system provided for by Ordinances Nos. 1615 and 1997, N. C. S., the repeal of Section 3 of Ordinance No. 1997, N. C. S. by Ordinance No. 2683, N. C. S., and the other facts of the case.

THE \$50,000 DEPOSIT.

It will next be recalled that by paragraph (c) of Section 2 of Ordinance No. 1997, the defendant was bound expressly "to deposit with the fiscal agent of the City of New Orleans bonds or other securities satisfactory to said fiscal agent of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company" with the obligation to build the double tracks from the upper park line to Henderson Street, in the event that the Frisco failed, without legal excuse, to build said tracks on or before July 1, 1904. This deposit was to be made, in point of time, before any track construction work was begun by defendant.

The defendant had not made this deposit at the date when the *Port Commission case* was decided, on May 23, 1904, and, although there was ample time to make it after the rendition of the decision, and before July 1, 1904, defendant did not make it on or before the latter date. The defendant did not make the deposit until November 10, 1905, nearly *eighteen months* after the decision of the *Port Commission case*.

Counsel for defendant contend that defendant is entitled to the benefit of the extension of time for performance granted to the Frisco, during the pendency of the Capdevielle suit, by the resolution of the City Council of March 3, 1903. (*Ante*, p. 30).

Why this should be so is not easily seen, as defendant is in no sense the successor or assignee of the Frisco or a party privy to the Frisco ordinance, its grant by Ordinance No. 1997, N. C. S., being a separate, distinct and independent grant from that made to the Frisco by Ordinance No. 1615, N. C. S.

Be this, however, as it may, the extension of time for performance granted to the Frisco by the resolution of March 3, 1903, was only five months. Allowing, with a liberal margin, this additional time for the deposit, the defendant, if it deemed itself entitled to any rights in connection with the so-called *public belt* system devised by the Frisco ordinance, should have made its deposit on or before December 1, 1904. Its failure so to do indicates clearly that it, in common with the Frisco, the City and the public, acquiesced in the abandonment made imperative by the decision of the Supreme Court in the *Port Commission* case of the so-called *public belt* railroad project, devised by the Frisco ordinance (No. 1615, N. C. S.).

Under no calculation and by no process of reasoning, could the time for this deposit be extended until November 10, 1905.

THE DEPOSIT A CONDITION PRECEDENT.

It would also appear that the condition imposed by paragraph (c) of Section 3 of Ordinance No. 1997, N. C. S. (the L. R. & N. ordinance), in regard to the deposit of fifty thousand dollars, was suspensive. Paragraph (c) provides that, before the Louisiana Railway and Navigation Company could execute the contingent and conditional grant to operate its trains, locomotives and cars over tracks to be built by it between the upper track line and Henderson Street, it was bound to deposit with the fiscal agent of the

City bonds of the value of fifty thousand dollars, as security for compliance by said company with such obligation. The deposit was to *precede the execution of the obligation.*

Whether the requirement to make this deposit was a suspensive or resolutive condition, however, signifies nothing. If the defendant company had, at or after July 1, 1904, constructed the tracks between the upper park line and Henderson Street without making the deposit, it might be that the Court would be justified in holding that the deposit had been waived, or if, at the time of complaint, the deposit was important, that it might be then made. Such, however, is not the fact. The defendant company has never constructed any tracks or done any act in execution of Section 3 of Ordinance No. 1997, N. C. S.

THE LAW OF THE CASE.

The principles of law governing this case are few and simple.

We have demonstrated that the grants made by defendant's ordinance are subject to conditions precedent or suspensive, and that the uncertain events upon which the grants were made to depend never happened; and we argue that, therefore, the grants made to defendant never took effect.

While it is true that defendant's ordinance constitutes a commutative contract (it being an ordinance containing mutual covenants), it is also true that it is a conditional contract containing the conditions suspensive hereinbefore stated. Counsel for defendant seem to think that because plaintiff maintains that the contract contains conditions, that plaintiff also maintains that the contract is not commutative; whereas the contract is both a commutative and a conditional one.

In the case of *Connell vs. Hope Insurance Company*, 3 Martin (N. S.), 226, the Supreme Court of Louisiana, speaking of conditions precedent or suspensive, says:

"They are recognized and provided for by our system of jurisprudence, and by every other that has in view the ordinary transactions of men. The obligation is conditional when it *depends* on a future or uncertain *event*, says our Code. The *event*, then, must be shown to make the obligation binding on the party against whom it is presented, for, until it takes place, he is not bound to perform what he has promised. (Civil Code, 272, Article 68). There is an exception to this rule in regard to the dissolving condition, but in relation to all others it is true, and it is a matter of no moment whether we say the obligation is *suspensive* until the condition is performed; * * * or that the performance of the condition must *precede* the execution of the obligation. (Civil Code, 274, Articles 81 and 83; Toullier Droit Civile Francais, Livre 3, Tit. 3, Chap. 4, No. 472; Pothier, Traite des Ob., No. 202).

"Article 2021 of the Civil Code of Louisiana, which has taken the place of Article 68 of the Code of 1808, says: 'Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happens, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition.'

"Article 2043 of the Revised Code, which is an amendment of Article 81 of the Code of 1808, says: 'The obligation contracted on a suspensive condition is that which depends either on a future and uncertain event, or on an event which has actually taken

place without its being yet known to the parties. In the former case the obligation cannot be executed till after the event; in the latter, the obligation has its effect from the day on which it was contracted, but it cannot be enforced until the event is known.'

"Article 2045 of the Revised Civil Code, which corresponds with Article 83 of the Code of 1808, says: 'The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed. It does not suspend the execution of the obligation; it only pledges the creditor to restore what he has received in case the event provided for in the condition takes place.'

"Pothier says: 'The effect is a *suspensive* condition, as its name necessarily implies, is to suspend the obligation until the condition is accomplished or considered as accomplished: till then nothing is due—there is only an expectation that what is undertaken will be due; *pendente conditione non dum debetur sed spes est debitumiri*. (*Traite des Ob.*, No. 218.)"

Applying those principles of law to the obligations imposed and the rights conferred upon the Louisiana Railway and Navigation Company, every doubt that the conditions formulated are suspensive is necessarily resolved.

The distinction between conditions suspensive and resolutive, in Louisiana law, has been considered by Your Honors in the case of *New Orleans vs. Texas & Pacific Railroad Company*, 171, U. S. 312.

The contention of the learned counsel that the defendant company was not obliged to make the deposit of bonds to the value of fifty thousand dollars until after a demand for

the deposit had been made by the city, and the deposit had been neglected or refused by the defendant—in other words, until after such a putting in default—is untenable.

The contract was the law between the parties, and it fixed the time for the deposit on July 1, 1904. If the defendant allowed this date to pass without making the deposit, it did so at its peril, and it cannot complain if the City made the deposit legally impossible subsequent to the 1st of July, 1904, by the repeal of Ordinance No. 1997, N. C. S., by Ordinance No. 2683, N. C. S., and by the institution of this suit, which is itself a placing in default.

“When an obligation has been contracted on condition that an event shall happen within a limited time the condition is considered as broken, when the time has expired without the event having taken place. If there be no time fixed, the condition may always be performed, and it is not considered as broken until it has become certain that the event will not happen.” (*Article 2038, Revised Civil Code of Louisiana*).

In the case of *New Orleans vs. Texas and Pacific Railroad Company*, 171 U. S. 312, a case involving ordinances containing suspensive conditions, which ordinances had been repealed without any other putting in default, the Supreme Court of the United States recognized that the suspensive condition had not happened, and maintained the repealing ordinance.

The repeal of Ordinance No. 1997, N. C. S., by Ordinance No. 2683, N. C. S., was effected without protest or objection on the part of defendant company.

Counsel for defendant makes the argument that Ordi-

nance No. 1615, N. C. S., was but an ordinary contract, by which the City contracted with the Frisco to construct the *so-called public* belt railroad system outlined in the ordinance, just as the City might have made a contract with any ordinary contractor to build the *so-called public* belt. That, the Frisco having failed to build, the defendant had a right to build; and, the exercise of this right being enjoined, the defendant has a right to operate over the tracks the city built. We cannot agree with this theory, because Ordinance No. 1615, N. C. S., granted to the Frisco a franchise right to operate a railroad over the *so-called public* belt system, and, incidentally, and as a consideration for the right, required the railroad to construct the tracks for joint use by the railroad and the public. If, however, the position taken by the learned counsel, that Ordinance No. 1615, N. C. S., was but an ordinary contract to build tracks, is well taken, the defendant company is without any right in the present controversy.

An ordinary contract for the building of railroad tracks would be identical in character with an ordinary contract for the construction of public buildings or other public works, and such contracts the City has a right to cancel at pleasure by paying the contractor the value of the work already done and the damages he has suffered.

Article 2765 of the Revised Civil Code of Louisiana says:

"The proprietor has a right to cancel at pleasure the bargain he has made even in case the work has already been commenced by paying the undertaker for the expense and labor already incurred, and such damages as the nature of the case may require."

The repeal of Ordinance No. 1997, N. C. S., by Ordinance No. 2683, N. C. S., was a cancellation of the contract imported by the former ordinance; and, as the defendant has

not been put to any expense whatever, its only right would be to apply to the courts, in a proper proceeding, for a decree awarding it damages, if any it has suffered, which we deny.

DECISION OF THE LOUISIANA SUPREME COURT ON THE MERITS.

The decision of the Louisiana Supreme Court upon these matters was as follows:

"The question of whether the deposit of \$50,000 of bonds was not made within the limit of time allowed for making it was unimportant. The making of this deposit was not to be a condition precedent of the coming into existence of defendant's obligation, or right, to do the work * * * * The sole effect of this deposit clause was to confer upon the city the right to require the deposit to be made; and, in default of its being made, to put an end to the contract in the manner provided by law for enforcing the resolutory condition in commutative contracts."

"We agree with the plaintiff, however, that the contract was subject to a suspensive condition, and that this condition had become impossible of realization, and the contract had, in consequence, fallen through, when the plaintiff made its attempt to begin work and the injunction was taken." (127 La. 795; *Record*, p. 129, *print*.)

The court then goes on to give the reasons for its judgment (*Record*, pages 429-438, *print*). The clear, thorough and judicious opinion of our Supreme Court is irresistibly convincing that its conclusion that

"the contract with defendant was conditional upon its being possible for the Frisco or defendant to construct the five miles of road, as the initial step in carrying out the scheme of having the entire belt con-

structed by the railroads and contributions from them; and that when the scheme became impracticable through the Dock Board's opposition to it, the contract came to an end" is decisive.

It is absolutely clear that this cause was decided by the Louisiana Supreme Court upon no other ground than the conditional character of the grants, and it is also absolutely clear that the decision is correct.

CONCLUSION.

NO HARDSHIP TO DEFENDANT.

A decision of this case in favor of the City of New Orleans will not entail hardship upon the defendant company.

Ordinance No. 1997, N. C. S., conveyed to it many and most valuable rights in addition to the contingent and conditional rights along the river front, in possession and enjoyment of which valuable rights it stands to-day. The property it purchased at the Willow Grove Landing, and to which as a terminal site no reference is to be found in Ordinance No. 1997, N. C. S., has largely increased in value since its acquisition. The expenditure of \$44,266.14, for the filling of Poydras ditch, has resulted in giving defendant enjoyment for ninety-nine years of the space formerly occupied by the Poydras ditch, a piece of public property one mile long and forty feet wide.

The record does not disclose that the defendant company has lost a dollar because of the fact that it has not been able to occupy the river front, though it may, or may not, be a fact that the defendant's entire railroad system has not proven a profitable one.

The defendants' business along the river front is be-

ing well and satisfactorily handled under the agreement of August 25, 1908, (*ante*, p. 85) and increased facilities can be furnished and better arrangements can be made in its behalf by the Public Belt Commission whenever the defendant so desires. Its own agent, Mr. F. F. Haddix, wrote the following letter (*Record, print*, p. 292) :

"NEW ORLEANS, March 10, 1909.

"MR. A. S. PHELPS, "

"*Supt. Public Belt Railroad, City:*

"DEAR SIR—You will note by referring to the memoranda attached that this line delivered you more cars in switch service month of January than any of the New Orleans lines, and we stood second in December; and I am satisfied that we stand first on the list month of February, as we paid \$1,104 for February switching.

"We would like to take this occasion to express our appreciation of the service that you have been giving us for the past sixty days. Will state our business has been handled very satisfactorily by the Public Belt, and our officials, as well as myself personally, appreciate the effort you have put forth that brought about this good service. You have enabled us in quite a number of cases to make delivery to steamers on some of our cars within twenty-four hours after the arrival through your tracks on the front.

"Yours truly,

"F. F. HADDIX,

"*Agent.*"

It is true that Mr. Haddix was made to testify (*Record, print*, p. 228) that the letter had been written by him at the

request of the superintendent of the *Public Belt Railroad System*, but, of course, the contents of the letter are true, and Mr. Haddix, under oath, so stated.

The record does not contain any demonstration that the business of the defendant company can be handled more economically by the operation of its own trains and cars, over tracks to be built by it at its own expense, to a terminus to be established at Willow Grove Landing, where, exclusive of the purchase price of the property, great expenditure must be undergone for the construction and maintenance of tracks, wharves and sheds.

The defendant failed to show, upon the trial of the cause, what the amount would be which such expenditures would necessarily require defendant to absorb in its freight rates, although it is quite clear that, if it cost the company, for track-building, alone, along the river front, what its president in his testimony (*Record, print, p. 164*), stated it cost him to build a switch-track connection and sidings between the main line and the Protection Levee—namely, \$60,000—the amount to be absorbed would certainly exceed the Public Belt Railroad's Commisissions' charge of \$2 per car, plus the Port Commission's wharfage dues upon vessels.

Under all the circumstances, the suspicion that the defendant's main purpose is to secure a mortgagable franchise is not wholly unwarranted.

DECISION AGAINST CITY MEANS DESTRUCTION OF THE PUBLIC
BELT RAILROAD.

A decision against the City of New Orleans in this case must necessarily result not only in the impairment of the usefulness but in the certain destruction, of the Public Belt Railroad system of the City of New Orleans.

The record will show that, while it is practical to operate more than one railroad over main tracks, it is not advisable or practical to operate a switching system of tracks except with a separate and independent equipment. The movement of trains over main tracks can be safely, and with more or less convenience, controlled by schedules, by train orders or signals. The operation of switch tracks, however, contemplates the breaking up of trains and the moving of different cars to and from different points, and cannot be properly administered for such service if rights of way over the tracks are exercised by the trains of other operators. The testimony of Mr. Frank T. Mooney, an acknowledged expert in the practical handling of switch systems in New Orleans, establishes beyond all question the correctness of our statements. He gives an actual and concrete illustration which is most instructive (*Record, print, p. 139*): The Illinois Central Railroad Company in administering certain main tracks into its Union Station, over which a number of railroads run their passenger trains in and out of the station, controls the movement of these trains by schedules, train orders or signals. In operating a switching system, however, from the rear of the city through St. Joseph Street to the river front, thence along the river front to a point above Protection Levee, and thence again to the rear, its experience had led it to prohibit the passage of any locomotive over the tracks except its own locomotives used in its switching operations.

The *Public Belt Railroad system* is one entire switching system. If its operation at any one point be hampered, the whole plant will be thrown into confusion. It is not operated for the better convenience or greater dispatch of the business of one railroad, or of one shipper, but for the equal convenience and equal dispatch of the business of all railroads and shippers. Every availa-

ble foot of reservation is actually needed for use and extensions. Its exclusive connections with the existing and contemplated public wharves, by means of which the export and import business of New Orleans is, and will be, served, will be interfered with if special rights in connection with the administration of the tracks or the movement of trains or cars are given to any railroad corporation. To force the City to submit to a joint control and operation of this switching system with defendant would be to hamper and retard the commercial progress of New Orleans, for the development of which the *Public Belt Railroad system* is one of the most important and potential agencies.

Counsel for defendant in argument ingeniously suggest that there could be no practical difference between the operation of the *Public Belt system* with the Public Belt equipment and its operation in connection with the defendant Company, if the company subjected the movement of its cars entirely to the control of the Public Belt Commission, and furnished to the Public Belt Commission for its control and use the company's locomotives for switching service.

Even if this were done, the defendant naturally would claim special consideration in return for what it furnished, and would have control of the employees engaged in the operation; but the hypothetical suggestion made by the learned counsel does not comport with the privileges granted by Ordinance No. 1997, N. C. S.

Paragraph (c) of Section 3 of Ordinance No. 1997, N. C. S. (the L. R. & N. ordinance), granted to defendant

“the right and privileges to operate its *trains*, cars and traffic over said tracks, under all the provisions and terms of said paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.” (*Ante*, p. 34.)

Subdivision (e) of said paragraph 10, gave to the Frisco, and all other contributing railroads,

"the right to operate their own *locomotives*, cars and equipment over said Public Belt, under the control of the Public Belt authorities." (*Ante*, p. 27.)

Paragraph (f) of Ordinance No. 1997, N. C. S., contemplated that controversies between the public authority and defendant must necessarily arise as to the regulations relative to the movement and handling of cars, trains and traffic over the tracks between the upper limits of the city and Henderson Street, and provided for an arbitration commission, in the selection of which defendant was given the special right to appoint one arbitrator as against the right of the public authorities to appoint another arbitrator to represent the general public, and other transportation lines; and paragraph (j) of Section 3 of Ordinance No. 1997, N. C. S. (*Ante*, p. 38), provides that, in the control and management by the Public Belt authority of the tracks there shall be no discrimination against the *trains* and traffic of defendant company, or any other companies granted the right to use said tracks.

If the City should be compelled to allow the operation of the trains of defendant over its belt system, and must operate its switching service and run its own trains in such a way that defendant can set up pleas of discrimination against it to be referred to its arbitration commission, and is not left free to serve alike all railroad companies, all other transportation companies, and all shippers, in such manner, and under such rules and regulations, as it deems best and wisest for this general service, the *Public Belt Railroad system* will be necessarily rendered inefficient.

Besides, if defendant is to have the right to operate its trains, cars and traffic over the *Public Belt system*, it would

be but fair that other railroads should have similar rights; and the ultimate result must be the extinction of the *Public Belt system*.

Moreover, the *Public Belt Railroad system* is presently operating, under conditions imposed by the Port Commission and the Orleans Levee Board, one of which is that the approval of these boards shall remain in force only so long as the *Public Belt Railroad*, in whole or in part, is exclusively operated, managed and controlled by the Public Belt Railroad Commission, and that no rights or privileges are granted to any railroad company to control, manage, or operate on, said tracks.

If the defendant company should be recognized as entitled at this time to any rights under Section 3 of Ordinance No. 1997, N. C. S., the *Public Belt Railroad* would no longer be *exclusively* operated, managed and controlled by the Public Belt Railroad Commission, and the defendant would have a right to share in the control, and would have a right to operate on said tracks, in violation of the condition which has been imposed upon the *Public Belt system*.

Counsel for defendant have argued that this condition was not imposed prior to the date when Ordinance No. 1997, N. C. S., was adopted, and that, after that date, the Port Commission was without further authority in the premises. This contention is without merit. The approval given by the Port Commission of Ordinance No. 147, N. C. S., establishing the *Public Belt Railroad System*, was given upon substantially the same condition, and, besides, was not such official action as exhausted its power over the subject-matter for all time to come.

Ordinance No. 147, N. C. S., is and has been judicially declared by the Louisiana Supreme Court, in the *Port Com-*

mission case, to be, different in its terms and provisions from Ordinance No. 1615, N. C. S., and is different in its terms and provisions from Ordinance No. 1997, N. C. S., and the *Public Belt Railroad system* outlined by Ordinance No. 147, N. C. S., differs radically from the belt railroad system outlined by Ordinance No. 1615 and 1997, N. C. S.

FINAL VERDICT OF THE PEOPLE FOR THE PUBLIC BELT RAILROAD.

The final verdict of the public in the controversy of public terminals against private terminals along the river front of the City of New Orleans has been rendered. On November 20, 1907, the General Assembly of the State of Louisiana appointed a commission to examine into port charges and terminal facilities at the leading seaports on the South Atlantic Ocean and the Gulf of Mexico. In its report, submitted to the General Assembly on May 13, 1908, and by that august body duly approved, will be found the following:

"In this connection there is one thing paramount above all others with which this commission is impressed:

"The Galveston water front is a system of private terminals. So is that of Savannah, Pensacola and Mobile.

"The shipping business of Galveston is simply a question of transferring freight from cars to ship. So it is in Savannah, Pensacola and Mobile.

"Galveston local trade is gone. So is that of Savannah.

"Galveston is a completed city. So is Savannah.

"These conditions show that the only way in which a city can derive the full advantage that belongs to

it from its water front is to operate it for itself by a system of public wharves.

"It is as true as any fact can be that the more public facilities that are given to corporations the less will the city enjoy them.

"Let us demonstrate our own situation by a concrete case:

"A shipper from Chicago to any foreign port can consign his goods over Stuyvesant Docks without the least trouble; and, of course; a New Orleans shipper to the same port, with an order originating in New Orleans, can only send his goods over Stuyvesant Docks, if at all, by the gracious permission and favor of the foreign freight agent of the Illinois Central Railroad Company. Certainly, not at all if the goods from Chicago and other places demand the room and facilities. The New Orleans people, to whom the river front belongs, are shut out, to the advantage of the Chicago shipper.

"Following this condition to its logical conclusion, and giving all the river front up to private terminals, the time would come when a New Orleans shipper could not ship through the Port of New Orleans at all.

"The river front is the greatest heritage which the people of New Orleans possess, and the policy of granting it to railroads is the most suicidal which can be pursued. Let her citizens look well to the preservation of this priceless privilege, for, when once it is given away, it can never be retaken.

"THE BELT RAILROAD.

"The commission finds that the Public Belt Railroad is nearly ready for operation, but that it, like

the Board of Commissioners of the Port of New Orleans, is restricted and limited by lack of means.

"The commission believes that, through its instrumentality, New Orleans will be relieved of many troubles that now beset her commerce, and that, *by the means of the Public Belt Railroad, the cheap and easy handling and concentration of freight will be most surely accomplished.*

"The commission recommends to the Legislature the passage of a law authorizing the issuance of bonds to facilitate the work, a copy of which is submitted herewith."

On April 8, 1909, the Board of Commissioners of the Port of New Orleans adopted the following resolution:

"Whereas, the necessity exists, in the judgment of the Board of Commissioners of the Port of New Orleans, for the extension of the wharves, landings, sheds and other facilities, owing to the growing commerce of this port; and,

"Whereas, this board should now exercise the right of extending said wharves, landings and shed system delegated to it by the law creating said board:

"Be it resolved, That all that portion of the river front of the City of New Orleans lying between Napoleon Avenue and the upper parish line of the Parish of Orleans, and all portions of said river front of said city lying between Clouet Street and the lower line of the Parish of Orleans, on the left bank of the Mississippi River, be, and the same is hereby, appropriated for public wharves, landings and shed purposes, where sheds may be necessary.

"Be it further resolved, That the engineers of this board prepare their plans and specifications for the construction of such wharves, landings, sheds and

other improvements as may be necessary to accommodate and facilitate the import and export business of the port.

"Be it further resolved, That the plans and specifications to be furnished be of such character as will carry out the increased demands for additional wharves, facilities, etc.

"Be it further resolved, That a copy of this resolution be forwarded to the Board of Commissioners of the Orleans Levee District, and that, after the preparation of said plans, the proper request be made upon said Board of Levee Commissioners for its consent in so far as said consent may be necessary in the premises."

By a vote of the electors of the State of Louisiana, had on November 3, 1908, Act 179 of the General Assembly of the year 1908, authorizing the City of New Orleans to issue two million dollars of bonds for Public Belt Railroad construction and completion, was ratified as an amendment to, and made part of, the Constitution of the State of Louisiana. Sections 6 and 7 of that act are as follows:

"SECTION 6. Be it further enacted, etc., That *there shall be, and there is hereby, irrevocably dedicated to the people of the City of New Orleans, for perpetual and exclusive public use, said Public Belt Railroad system, as the same has been heretofore, or may hereafter be, established by the City of New Orleans the title and use to which said Public Belt Railroad system shall be, and shall forever be, in the people of the City of New Orleans.*

"That all laws, servitudes, privileges and rights in favor of the State of Louisiana, the City of New Orleans, and the people of the City of New Orleans,

now existing in or on the lands or property on or contiguous to the Mississippi River, shall continue to exist unimpaired until the full payment of the principal and interest of the bonds to be issued under this act.

"SECTION 7. Be it further enacted, etc., That the City of New Orleans shall construct, equip, maintain and operate said Public Belt Railroad system of the City of New Orleans, through and by means of such board or commisison as may have been, or may be, organized by the City of New Orleans, the members of which shall be appointed by the Mayor of the City of New Orleans, with the consent of the Council, the powers, duties and functions of which shall be prescribed by the City of New Orleans. The City of New Orleans shall always have the power and authority to make such changes in the location of the tracks and roadbed of the Public Belt Railroad system as may by said city be deemed necessary or proper. *The control, administration, management and supervision of construction, maintenance, operation and development of the Public Belt Railroad of the City of New Orleans shall be exclusively vested, and remain, in such board or commission, which shall always be separate and distinct from that of any railroad entering the City of New Orleans, and no director, officer or employee of a State or interstate railroad shall ever be allowed to act as a member of said commission, or as an officer of the Public Belt Railroad, and no rights or privileges shall be granted to any railroad company to control, manage, use or operate the said Public Belt Railroad system, or any part thereof, and said Public Belt Railroad system shall be and remain the sole property of the people of*

the City of New Orleans at all times, and shall in no way or manner ever be hypothecated or alienated; provided, however, that the revenues of the said Public Belt Railroad of the City of New Orleans, after the deduction of the expenses of maintenance and operation, shall be and remain pledged for payment of the bonds, in principal and interest, the issue of which is herein authorized, to such an extent as may be necessary under this act."

An issue of \$300,000 of the bonds authorized by this act have been sold and the proceeds thereof expended for the authorized purposes. The *Public Belt Railroad* of the City of New Orleans is now an accomplished fact—a unique, but legitimate public utility—a governmental instrumentality, dedicated to public use, and operated exclusively for a genuine governmental purpose, the common benefit and good of the inhabitants of the City of New Orleans and of the whole public as well. Its history, from its beginning to its present stage of completion and operation, shows the gradual upbuilding, in spite of opposition and misunderstanding, of a great public utility, the like of which is not to be found elsewhere in the United States, and this unique utility has as we have just shown, recently received the constitutional sanction and approval of the people of the City of New Orleans and of the State of Louisiana.

Shall their verdict be avoided and set aside?

Finally, we reiterate that the Supreme Court of Louisiana did not give effect to said Ordinance No. 2683, N. C. S., in any manner whatsoever, nor was the consideration of that ordinance at all necessary to the determination of the case, nor did the Court deem its consideration necessary; but, on the contrary, the Court proceeded to decide the case wholly

without reference to the said Ordinance No. 2683, N. C. S. It based its decision exclusively upon the ground that the contract of the plaintiff in error (*Ordinance No. 1997, N. C. S.*), the execution of which defendant in error sought to restrain by injunction, and under which plaintiff in error asserts its rights, was dependent for its execution upon suspensive conditions that did not eventuate, and hence plaintiff in error could not exercise the franchise claimed under said ordinance. This ground is wholly independent of any Federal question, and broad enough to dispose of the case without reference to any Federal question; and, furthermore, it is a ground which would, necessarily, have had to be determined before the question of the impairment of the obligation of the contract of plaintiff in error could have been considered at all, and would have been equally controlling if the ordinance complained of as impairing the obligation of the contract had never been passed.

We pray that the writ of error be dismissed and the judgment affirmed.

Respectfully submitted,

I. D. MOORE, *City Attorney,*
Counsel for Defendant in Error.

October 1914.

Supreme Court of the United States

OCTOBER TERM, 1913.

49
No. 235

FILED

MAY 4 1914

JAMES D. BAKER

LOUISIANA RAILWAY AND NAVIGATION
COMPANY,

Plaintiff in Error,

vs.

MARTIN BEHRMAN, MAYOR OF THE CITY OF
NEW ORLEANS,

Defendant in Error.

In Error to the Supreme Court of the State of Louisiana.

BRIEF OF PLAINTIFF IN ERROR OPPOSING MOTION
TO REHEAR WRIT OF ERROR.

FOSTER, HELLING, BRIAN & SAAL,
WISE, RANDOLPH & RENDALL,

Attorneys for Plaintiff in Error.

M. J. FOSTER.

May 1, 1914.

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Supreme Court of the United States

OCTOBER TERM, 1913.

No. 329.

LOUISIANA RAILWAY AND NAVIGATION
COMPANY,

Plaintiff in Error,

versus

MARTIN BEHRMAN, MAYOR OF THE CITY OF
NEW ORLEANS,

Defendant in Error.

In Error to the Supreme Court of the State of Louisiana.

BRIEF OF PLAINTIFF IN ERROR OPPOSING MOTION
TO DISMISS WRIT OF ERROR.

STATEMENT.

The Shreveport and Red River Valley Railroad was owned by William Edenborn. He constructed this road from Shreveport to Alexandria, and, it coming down the

valley of the Red River and penetrating the New Orleans trade, the business men of New Orleans were anxious to secure its entrance into the city. So the commercial bodies of New Orleans called upon Mr. Edenborn and solicited his building the road into the City of New Orleans. Several conferences were held, and Mr. Edenborn was assured that he would get liberal concessions in the way of franchises from the City Council of the City of New Orleans, and would get such grants of right of way as would enable him to reach the river front. Acting upon this assurance, he purchased property in the City of New Orleans and secured grounds sufficiently large to erect terminals on the river front. These terminals could only be reached by a grant of right of way over the Public Belt Railroad then constructed and over the Public Belt reservation and right of way as then existing by ordinance of the City Council.

During the time the commercial bodies were negotiating with Mr. Edenborn, another so-called railroad entered the field, and applied to the City Council for certain franchises, rights of way, etc. This road was known as the "New Orleans and San Francisco Railroad Company." The city granted to it rights of way over various streets, and, among other rights of way granted to it, a right of way

"over the double-track belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson Street, upon the following terms and conditions."

The validity of this ordinance was assailed by suit instituted in the name of Paul Capdevielle, Mayor of the City of New Orleans, against the New Orleans and San Francisco Railroad Company. Another suit was instituted by the Board of Port Commissioners of the City of New Or-

leans against the New Orleans and San Francisco Railroad Company. The first suit was decided shortly after it was presented to the Supreme Court, and adversely to the city. The second suit pended for more than a year. After the decision of the *Capdevielle suit*, and while the suit of the Board of Port Commissioners was pending, Ordinance No. 1997, N. C. S., the subject of controversy in this litigation, was passed in favor of the Louisiana Railway and Navigation Company, it being the successor of the Shreveport and Red River Valley Railroad Company, and, among other grants made to it, it was granted a right of way over the Belt Railroad in the following language:

"The Louisiana Railway and Navigation Company is hereby granted a right of way over the double-track belt line and reservation on the river front of the City of New Orleans from the upper limits of the City of New Orleans to Henderson Street, upon the following terms and conditions."

Here follow the conditions which are really the considerations for the grant.

The first condition expressed is that the Louisiana Railway and Navigation Company should pay to the City of New Orleans the sum of \$50,000 as the consideration for the grant when it had operated its trains for one month over the Public Belt. The alternative consideration was that, in the event the Frisco failed, without legal excuse, to build the Belt Railroad from the upper side of Audubon Park to Henderson Street, then the Louisiana Railway and Navigation Company should build same in lieu of paying the \$50,000. When the Louisiana Railway and Navigation Company approached the City of New Orleans with its main-line tracks, and reached a point near Protection Levee, it

then laid a spur track parallel with the Protection Levee to a point opposite the Belt Railroad tracks then constructed, with a view to connecting with same, repairing and rebuilding same and further completing the belt to Henderson Street, as it was required to do under the alternative consideration of its contract. (We use the word "contract" advisedly, since the Louisiana Railway and Navigation Company had accepted the grant under the terms requiring same, and thereby constituted it a commutative contract between the parties.) When it had gone upon the Public Belt reservation and proceeded to repair the said tracks, its laborers were arrested by the city officials, and shortly thereafter the injunction suit now before the Court was instituted upon numerous grounds, but the particular grounds that will be considered with reference to the motion to dismiss are as follows:

Tr., p. 8, print:

"That said ordinance No. 1997, New Council Series, has never been approved, ratified or confirmed by the Board of Commissioners of the Port of New Orleans, but, on the contrary, is contrary in letter and spirit to the resolutions of the Board of Commissioners of the Port of New Orleans, approving, ratifying and confirming Ordinance No. 147, New Council Series."

Tr., pp. 10, 11, print:

"Petitioner further avers that the City of New Orleans has complied with, has executed and is executing Ordinance No. 147, New Council Series, and Ordinance No. 2683, New Council Series, and is at this time in possession of the outer half of the neutral ground of Leake Avenue and connecting streets between the upper line of Audubon Park and

Henderson Street, and has at this time actually constructed and is constructing the Public Belt Railroad tracks on the outer half of said neutral ground," etc.

Your plaintiff in error (defendant in the court below), in reply to this cause of action set forth in the petition of plaintiff below, answered as follows (Tr., p. 30, print):

"Your defendant further shows with reference to Ordinance No. 2683, N. C. S., which was amendatory to Ordinance No. 147, N. C. S., and is pleaded by plaintiff in support of its cause of action herein, that said ordinance was passed after Ordinance No. 1997, N. C. S., was accepted by your defendant, and after same had become a valid and binding contract between respondent and the City of New Orleans, and that any resolution or ordinance of said Council passed subsequently cannot affect the rights of your defendant; and, if the Court attempts to attach weight to same, or in any manner to construe the same so as to affect the right of your defendant, then it is giving effect to a law which impairs the obligation of the contract of your defendant; it attempts to divest vested rights, and is in violation of Articles 2 and 166 of the Constitution of the State of Louisiana and of Section 10, Article I, of the Constitution of the United States. Your defendant pleads the unconstitutionality of said ordinance and such interpretation as being repugnant to Articles 2 and 166 of the Constitution of the State of Louisiana, and especially of Section 10, Article 1, of the Constitution of the United States."

This is the particular issue raised and passed upon in the Court below, and which inheres in the case throughout, and necessarily inhered in the decision of the Supreme Court

of Louisiana, that is to be considered by this Court in determining the motion filed by the defendant in error to dismiss the appeal, for the reason, as averred by it, that the Supreme Court of the State of Louisiana did not decide, nor was it necessary to dispose of the case that it should decide, any Federal question.

We submit the following quotation from *Chapman vs. Goodnow's Administrator*, 123 U. S. 540 (548), as

THE LAW OF THIS CASE:

"If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of Section 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused."

Our contentions are:

1. That a Federal question is raised by the plaintiff in the original suit, defendant in error, in that he avers and relies upon the effect of Ordinance No. 2683 and the resolution of the Board of Port Commissioners approving the same (Tr. pp. 6-7) as ground for the injunction; that this ordinance and resolution imposed conditions which violate the contractual rights of plaintiff in error, and, if enforced, would make it impossible for it to exercise the right granted it under the contract.

2. That this position of the defendant in error was maintained by the judgment of the lower Court, and that judgment especially decrees (Tr., p. 407, print):

"That the Ordinance No. 2683, repealing the grants in both instances, was the exercise of the legal

right of the city, and did not impair the obligations of the contract, and hence that the rights of the Louisiana Railway and Navigation Company have lapsed and the injunction properly issued."

3. That this judgment of the lower Court was affirmed by the judgment of the Supreme Court of the State of Louisiana. (Tr., p. 438, print.)

(NOTE. The rule of law with reference to construing such judgments is found in the case of *Nielson vs. Lagow*, 12 How. (U. S.) 110, in which the Court says:

"It has been the practice of this Court whenever necessary to look at the record of proceedings of the inferior state court in connection with the proceedings of the highest Court, in order to deduce therefrom the points decided by the latter.")

4. That in the opinion of the Supreme Court (Tr., p. 427, print) we find the following language:

"But the city had, in the meantime, in October, 1904, thirteen months before the date of the deposit, passed an ordinance reorganizing the Belt Road Commission, and making adequate financial and other provision for the construction and operation of the belt, and repealing all conflicting ordinances. Against that action, on the part of the city, defendant had made no protest; although defendant could not but have known of it, since the measure had attracted a great deal of attention; in fact, had been looked upon as so important as to constitute an epoch in the industrial life of the city, and had been celebrated as such by a mass meeting at which speeches were made."

The ordinance referred to is No. 2683, the one under discussion.

Your Honors will find by further examination of the case that this very idea that was embodied in the ordinance above referred to, which is No. 2683, dominated the mind of the Court in the entire opinion—that is, to permit the plaintiff in error to attempt to exercise its rights under its ordinance would be to break up or destroy the Belt Railroad scheme, for the reason that the consent of the Dock Board could not be obtained. Now, under Ordinance No. 147 and the resolution of the Dock Board approving the same, passed on the 12th day of August, 1902, plaintiff in error had a perfect right to exercise the right of way over the Belt Railroad, and, if necessary, construct a belt railroad upon the right of way, because its Ordinance No. 1997 had a provision which turned the Belt Railroad over to the Belt Commission immediately upon its construction, and was placed absolutely under the control of the said Belt Commission; in other words, this ordinance was framed absolutely for the purpose of meeting the objection of the Board of Port Commissioners as urged in their suit against the New Orleans and San Francisco Railroad Company and as sustained by the Court in 112 La. 1011. So if there had been no subsequent legislation by the City Council of the City of New Orleans, no further resolutions of the Dock Board, and no further restrictions of the Dock Board than those imposed in Ordinance No. 147 and the resolution approving the same, then plaintiff in error would have had a perfect right to have constructed the five miles of railroad as called for in the ordinance. Therefore, when the Supreme Court of the State of Louisiana, further on in its decision, declares (Tr., p. 432, print) :

“Such are the terms of the contract. And the consequences would have been that the condition sub-

ject to which the Dock Board granted permission to the Belt Road authorities to operate the Belt Road within the limits of the port, would have been violated, and the whole belt railroad project would have become impracticable,"

we see that it rests its opinion very largely upon the theory that the contract was impossible of performance, for the reason that it was impossible to secure the permission of the Board of Port Commissioners, commonly called the Dock Board. This is the same view taken by the District Court, except that the District Court declared affirmatively that the Ordinance No. 2683 repealed the ordinance which granted the franchise to plaintiff in error herein, and therefore that the right could not be enforced.

Now, under the authority above quoted, when the Supreme Court of Louisiana practically rests its judgment upon the same theory, but painstakingly abstains from referring to the ordinance itself as the reason why it thus holds, it is nevertheless a decision of a Federal question, and this Federal question is the only logical or reasonable question upon which the decision could have been based.

We contend further that there is a further Federal question involved, as is shown in the fourth assignment of errors (Tr., p. 448, print), which is as follows:

"FOURTH. The Court further erred, as will hereinafter appear.

"Paragraph 10 of Section 2, Ordinance 1615, N. C. S., commonly known as the 'Frisco Ordinance,' having been considered in the case of *Paul Capdevielle, Mayor, vs. New Orleans and San Francisco R. R. Co.*, and your plaintiff in error having contracted with the City of New Orleans with reference to said construction by the Honorable Supreme Court of the State of Louisi-

ana, placed upon said ordinance, said construction became part of the contract, and the Court therefore erred in not applying the same construction in this case as in that case, and is violating the contractual rights of plaintiff in error in placing a different interpretation upon said contract; and that, by refusing to apply the law of the land in the interpretation and construction of said contract, the said Court, in refusing to your plaintiff in error the equal protection of the law, which is violative of the Constitution of the United States."

Your Honors will understand that under the ordinance granting the right of way to the plaintiff in error it was contemplated that there might be a decision adverse to the right of the city to grant a right of way over that part of the property on the city front under the control of the Port Commission, and, therefore, as already stated, this ordinance of the plaintiff in error was framed so as to meet the objection of said resolution, but as a subsequent ordinance (No. 2683) of the City Council was passed and approved by the Dock Board or Port Commission on the 17th day of January, 1905 (Tr., p. 268, print), it then became impossible of execution. But at the time the ordinance was passed, it was also contemplated that a part only of the Belt Railroad might be constructed by the New Orleans and San Francisco Railroad Company, or might be constructed only by your plaintiff in error, in which event it should have the right of way over such portion as was authorized to be constructed; in other words, it had the right to build the railroad and exercise its franchise over all that part of the public belt reservation which was under the control of the City of New Orleans. The Court so held in the two cases above referred to, and that plain-

tiff in error contracted with reference to the construction placed upon the Frisco ordinance in the case of *Capdevielle, Mayor, vs. New Orleans and San Francisco Railroad Company*, 110 La. 904, and as approved in *Board of Commissioners vs. N. O. & S. F. R. Co.*, 112 La. 1011, and, therefore, when the Supreme Court of Louisiana in this case refused to apply the same interpretation and construction in the *Capdevielle case*, it then refused plaintiff in error the equal protection of the law.

This is especially so, as the plaintiff in error herein filed an application in the Supreme Court of the State of Louisiana and practically made itself a party to the case of *Capdevielle, Mayor, vs. New Orleans & San Francisco Railroad Co.*, for the purpose of having that opinion specifically construe the Ordinance No. 1615, N. C. S., as it then had pending before the City Council the ordinance which afterwards was adopted and ripened into a contract under which plaintiff in error was to succeed to the rights and obligations under Ordinance No. 1615 in the event the Frisco failed to build the road. (Tr., p. 333, print.) Therefore, the construction placed upon that ordinance in said suit was binding on all parties, and any subsequent decision of the Supreme Court which places a different construction upon the ordinance would not only be a refusal of the equal protection of the law, but would also be an impairment of the obligation of the contract of plaintiff in error.

Respectfully submitted,

FOSTER, MILLING, BRIAN & SAAL,
WISE, RANDOLPH & RENDALL,

Attorneys for Plaintiff in Error.

M. J. FOSTER.

*Murphy Foster
Counsel*

EXPLANATORY.

As the counsel for defendant in error, plaintiff in motion to dismiss the appeal, has, in the brief served, discussed the correctness to some extent of the judgment of the Supreme Court of the State of Louisiana, with a view of showing that the decision of a Federal question was not necessary, we desire to print as an appendix to this brief our brief in support of the application for rehearing, originally filed in the Supreme Court of the State of Louisiana, which application is printed at Tr., p. 439, print, and we believe that the Court by a perusal of this brief will be convinced that it was utterly impossible for the Supreme Court of the State of Louisiana to have rendered a judgment in favor of the plaintiff in original suit, defendant in error, on any ground other than the ground upon which the Judge of the District Court based his opinion—that is, that the ordinance in favor of your plaintiff in error had been repealed by the subsequent ordinance enacted by the City Council, No. 2683.

In writing this brief for rehearing, we also printed therewith the decision of the Supreme Court of the State of Louisiana, and numbered the various paragraphs; so your Honors will find that the brief herein frequently refers to a certain numbered paragraph of the opinion, which numbers do not appear in the copy of the opinion in the transcript (p. 416).

The argumentative portion of the brief is as follows:

BRIEF.

We submit the following brief in support of the application for rehearing, and in doing so we will not attempt to discuss singly each separate ground named in the application, but will endeavor to show the Court that the basis of the whole decision is erroneous.

We have averred that the Court erred in failing to sustain the

PLEA OF RES ADJUDICATA.

This contention is, however, immaterial, since the Court practically sustained the plea in every particular except the construction as to the divisibility of the ordinance which we will argue in another part of this brief. While it overruled the plea of *res adjudicata*, it disposed of several of the contentions at which the plea was directed by saying that the same contentions were made in the *Capdevielle case* and decided adversely to the city.

The

PLEA OF JUDICIAL ESTOPPEL

was only pleaded for the purpose of preventing the defendant from averring the invalidity of the ordinance. While the Court has overruled this plea it has practically held that the ordinance was valid, because same was so decreed in the *Capdevielle case*. So we will not enter into a discussion of the correctness of the decree on this exception, but will proceed to discuss the proposition submitted on the merits, and to do so we will combine and quote some of the paragraphs of the opinion which embody the idea advanced upon which the opinion rests.

Suspensive condition declared by the Court.

22. "We agree with plaintiff, however, that the contract was subject to a suspensive condition, and that this condition had become impossible of realization, and the contract had, in consequence, fallen through when plaintiff made its attempt to begin work and the injunction was taken."

39. "In the ordinance provision is made for these contingencies: First, that the Frisco shall construct the entire five miles of tracks down to Henderson Street; second, that the Frisco shall construct a part of the five miles of tracks, and then default in its contract; third, that the Frisco shall construct no part of the five miles of tracks."

40. "The first two of these three contingencies failed; the Frisco constructed no part of the tracks. The effect of this was to do away entirely with those phases, or aspects, of the contract designed to meet and provide for those two contingencies. The situation became the same as if no provision whatever had been made in the contract for those contingencies; or, in other words, as if the contract had been from the beginning one simply to construct the five miles of tracks on the terms and conditions specified in it."

Opinion of Court, par. 22, 39, 40.

From these combined paragraphs we infer that the Court has held that every right conveyed to the Louisiana Railway and Navigation Company under its ordinance was contingent or rested upon the Frisco building the road; that what we have averred as a commutative contract between the City of New Orleans and what the Court admits is a commutative contract, made so by the notarial acceptance of the defendant, rests upon a suspensive condition, which is the building of the Belt Railroad by the Frisco. If the Frisco built, then defendant's rights would attach, and it would be permitted to use the Belt Railroad upon the payment of a

Position of the Court as expressed in opinion defined.

moneyed consideration, and that the failure of the Frisco to build "without legal excuse" simply abrogates or wipes out that part of defendant's ordinance.

In furtherance of this idea the Court has treated the whole case as though the prevailing idea in the minds of all parties was that the City of New Orleans had a Belt Railroad to build; that the Frisco and the Louisiana Railway and Navigation Company were in the business of contracting, and that they had applied to the city to permit them to build the railroad, and that was the **CAUSE of the contract**, and **the consideration of the contract** was the **use of the Belt tracks**. The Court goes on further to say that the whole scheme was for the purpose of having the Belt Railroad built by railroads coming into the City of New Orleans, and that the grants made to the Frisco and the Louisiana Railway and Navigation Company were not over the Belt Railroad or over the reservation to Henderson Street, but over the entire Belt.

We are at a loss to know where the Court secures the evidence from which this conclusion is derived. Such evidence certainly is not embraced in the four corners of the instrument. It is not to be found in the record, because if we leave the instrument itself and seek the record we find exactly the contrary. The City of New Orleans conceived the idea of a belt railroad, and with a view of carrying out that idea it passed Ordinance No. 147, which will be found in the record at page 421, and will hereafter be more fully discussed. Its provisions, however, are full and complete, creating a Belt Railroad Commission, ordering it to proceed at once to build the Belt Railroad, or portions thereof; appropriating money for that purpose, and authorizing the making of any contract for the building of any portion of the Belt.

parol evidence as
intent of par-

Turning to the parol evidence upon this point, we would ask the Court to examine the evidence of Mr. Wm. Edenborn, and it will find that he testifies in detail the object that he had in mind in entering into any contract whatever with reference to the Belt. It was to secure a right of way over the Belt Railroad already built and the Belt reservation on the river front—a right of way by which he could reach his river terminals, **AND A RIGHT OF WAY, WHICH, IF IT HAD NOT BEEN PLEDGED TO HIM, HE WOULD NEVER HAVE BROUGHT HIS ROAD INTO THE CITY OF NEW ORLEANS;** in other words, **IF THE CITY COUNCIL HAD SAID TO WILLIAM EDENBORN WHAT THE COURT HAS SAID IN THIS OPINION, "THAT YOU CANNOT HAVE A RIGHT OF WAY OVER THE PUBLIC BELT RAILROAD OR RESERVATION ON THE RIVER FRONT, AND YOU CAN HAVE NO FACILITIES FOR REACHING YOUR RIVER TERMINALS," THEN THE LOUISIANA RAILWAY AND NAVIGATION COMPANY WOULD HAVE HAD ITS TERMINALS IN PORT ARTHUR INSTEAD OF IN THE CITY OF NEW ORLEANS.** So the purpose is clearly shown, if we gather the motive of the parties from evidence other than the instruments themselves. But, should not this case be decided upon a construction of the ordinances evidencing contracts entered into between the parties?

Civil Code, 2276.

Article 2276, Civil Code:

"Neither shall parol evidence be admitted against or beyond what is contained in the acts, nor on what may have been said before, or at the time of making them, or since."

Article 1945 of the Civil Code says:

Civil Code, 11

"Legal agreements having the effects of law upon the parties, none but the parties can abrogate or modify them. Upon this principle are established the following rules:

"FIRST. That no general or special legislative act can be construed as to avoid or modify a legal contract previously made.

"SECOND. That Courts are bound to give legal effect to all such contracts, according to the true intent to all the parties.

"THIRD. That the intent is to be determined by the words of the contract, when these are clear and explicit, and lead to no absurd consequences.

"FOURTH. That it is the common intent of the parties—that is, the intention of all that is to be sought for—if there was a difference in this intent, there was no common consent, and consequently no contract.

"All the articles of this section contain rules established by law for discovering the intent, when either the words of the agreement are ambiguous or circumstances render it doubtful. They apply as well to verbal as to written agreements."

Article 1946 of the Civil Code says:

Civil Code, 11

"The words of a contract are to be understood, like those of a law, in the common and usual signification, without attending so much to grammatical rules as to general and popular use."

Article 1948 of the Civil Code says:

Civil Code, 11

"When there is a doubt as to the true sense of the words of a contract, they may be explained by referring to other words or phrases used in making the same contract."

Let us first examine the Frisco ordinance with a view of ascertaining whether or not there is any such scheme as is spoken of by the Court to be inferred from the language of said ordinance. A portion of said ordinance is as follows:

"NO. 1615—NEW COUNCIL SERIES.

"AN ORDINANCE granting right of way and depot and other rights and privileges to the New Orleans and San Francisco Railroad Company.

"SECTION 1. *Be it ordained by the Council of the City of New Orleans*, That the New Orleans and San Francisco Railroad Company, a corporation organized under the laws of the State of Louisiana, and domiciled in the City of New Orleans, its successors and assigns, is hereby granted the right to enter the City of New Orleans, and to construct, maintain and operate with steam or electric power, its lines of railway tracks along, across and over the streets, highways and public places hereinafter mentioned, and to acquire for railway purposes by expropriation or otherwise, all property in the City of New Orleans needed for railway purposes, such as tracks, spurs, sidetracks, yards, water tanks, shops, platforms, sheds, warehouses, roundhouses, coal chutes, loading bins, depots and other appropriate appurtenances, and particularly the property hereinafter designated.

"SEC. 2. *Be it further ordained, etc.*, That said company, its successors and assigns is hereby granted the following rights of way in and through the City of New Orleans, to wit: * * *

Paragraph 10:

"Over the double-track Belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson Street, upon the following terms and conditions." * * *

tie of Frisco ordinance and Section 1.

Section 2, par. 10, Frisco ordinance.

The nine preceding sections each contain a grant of a right of way or some franchise to enable this railroad company to build its road into the City of New Orleans. Paragraph 10, Section 2, grants a right of way over the double-track belt line and reservation on the river front of the City of New Orleans. This part of the grant, however, is not gratuitous. It is upon certain conditions, and those conditions constitute the cause of the contract. The condition is to build a certain proportion of the Belt Railroad—that is, from the end of the tracks of the then existing Belt down to Henderson Street. So, instead of the city saying to the Frisco that it has a scheme to build the Belt Railroad and in consideration of the Frisco building a portion of it the city will permit the Frisco to use the same, the proposition is simply reversed, and the City Council says to the Frisco: "We desire to have your railroad enter the City of New Orleans, and we will pass an ordinance in the first nine sections of which we will make you gratuitous donations or grants, and in the tenth section we will grant you a right of way over our 'double-track belt line and reservation,' but for this you must pay an equivalent or partial equivalent—you must pay the cost of constructing the Belt Railroad to Henderson Street or you must construct it."

The grant is upon a consideration.

Now, let us turn to the ordinance of the Louisiana Railway and Navigation Company (No. 1997), and see if, from that ordinance, such a theory or idea can be derived from its language or the evident intent of the parties at the time that they were contracting. The title of this ordinance is:

"AN ORDINANCE GRANTING RIGHTS OF WAY AND DEPOT, AND OTHER RIGHTS AND PRIVILEGES, TO THE LOUISIANA RAILWAY AND NAVIGATION COMPANY."

Title to Ordinance 1997.

After giving rights of way over various streets, it then says:

Granting portion
of Ordinance 1997.

"The Louisiana Railway and Navigation Company is hereby granted right of way over the double-track Belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson Street, upon the following terms and conditions."
* * *

The first condition is contained in paragraph (a)—the payment of \$50,000 when the railroad company shall have operated its engines, trains and cars over the Belt tracks for a period of thirty days. Paragraph (b) says that, in consideration of the payment of the above sum, the Louisiana Railway and Navigation Company shall have the right to operate its own cars, equipment etc., to Henderson Street. Paragraph (c) is an alternative consideration. We again quote a portion of this paragraph:

Quotation from
par. (c), Ordinance
1997.

"That, in the event of the New Orleans and San Francisco Railroad Company, its successors or assigns, failing, without legal excuse, to build said Belt tracks from the upper side of Audubon Park to Henderson Street on or before July 1, 1904, the Louisiana Railway and Navigation Company shall build the same from the upper side of Audubon Park to Henderson Street under the terms and conditions of paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.; and, in case said Louisiana Railway and Navigation Company shall build said tracks, it is hereby granted the right and privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of said paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., said Louisiana Railway and Navigation Company assuming the obli-

gation of the New Orleans and San Francisco Railroad Company under said paragraph of said ordinance, and being hereby granted all the rights and privileges of said New Orleans and San Francisco Railroad Company, its successors or assigns, under said paragraph 10 of Section 2 of said ordinance, except as hereinafter provided, such construction of said tracks from the upper side of Audubon Park to Henderson Street to be in lieu of the payment of \$50,000 referred to in paragraph (a) of this section."

Does this ordinance, evidencing a contract, carry with it the idea that the Louisiana Railway and Navigation Company was out for the purpose of assisting the City of New Orleans in carrying out the Belt Railroad scheme? Is there anything in the ordinance conveying the idea that the Louisiana Railway and Navigation Company applied to the City of New Orleans for the purpose of building the Belt Railroad? To the contrary, every line of this ordinance shows that the object of the contract was the giving or granting by the City of New Orleans of certain rights of way and franchises to the railroad company in order to induce it to enter the City of New Orleans, some portions of said grant being gratuitous, others being onerous; and that the object about which they were contracting at all times was the granting of a right of way for this railroad to enter the City of New Orleans. We are at a loss to understand how the Court can from this instrument arrive at the conclusion as expressed in the above-quoted paragraph. To the contrary, the contract is susceptible of the interpretation if we are to put it in dialogue form between the City of New Orleans and the Louisiana Railway and Navigation Company, as follows:

Nothing in
the ordinance evi-
dences that the De-
fendant contracted to
build the Belt, or that
the City of New Or-
leans was to pay for
the Belt, or that
the Belt was to be
built by the City of
New Orleans.

opposed dialogue
between City and
defendant with ref-
erence to contract.

The city solicits the railroad to enter the city. The road says: "I will not enter your city unless you give me certain rights of way and franchises, and, among others, *I must have a right of way so as to reach the river front.*"

The city says: "I will grant to you a right of way over the Public Belt Railroad **ALREADY CONSTRUCTED** and the **BELT RESERVATION** on the river front from the upper city limits to Henderson Street, provided that you will pay me, one month after you have operated your cars, etc., over the same, \$50,000."

The Louisiana Railway and Navigation Company agrees to this proposition. But says the city, further: "I have now completed only two miles of this Belt Railroad. There are five miles more under contract to be built by the Frisco Railroad Company, and that is the part of the Belt I am giving you a right of way over on the payment of \$50,000. Now, it may be that the Frisco will fail to build this Belt Railroad, in which event I want you to obligate yourself to build it in lieu of paying the \$50,000; and, since

dialogue continued.

there has been so much talk and discussion in the newspapers about the City Council not demanding any security from the Frisco Railroad **which would require it to build**, I also demand of you security in the way of a deposit with the city's fiscal agent as a guarantee that you will build this five and a half miles of railroad track in the event of the failure of the Frisco."

Replies the Louisiana Railway and Navigation Company: "You are requiring me to put up \$50,000 as security that I will build this Belt Railroad on the defalcation of the Frisco. Now, suppose that it is impossible for the Frisco to perform the condition; in other words, suppose that the Court were to hold, in the suit now pending, that this grant

to the Frisco and this authority to the Frisco to build are absolutely null and void, and neither the Frisco nor anyone else can build a Belt Railroad for you. Then you would have my \$50,000, and it would be utterly impossible for me to perform the contract."

The city replies: "Well, in the event the Frisco is prevented from building, or fails to build, with legal excuse, then we will not require you to build."

Is not this supposed conversation, leading up to the contract between the City of New Orleans and the Louisiana Railway and Navigation Company, a more reasonable supposition than that expressed by the Court in its opinion?

THE OBJECT AND CONSIDERATION OF THIS CONTRACT DISCUSSED.

We must infer from the language of the two ordinances that the object of the contract was the granting of a right of way over the Belt Railroad already constructed and the Belt reservation on the river front "from the upper city limits of the City of New Orleans to Henderson Street," and the causes or consideration of the contract is, as far as the Frisco is concerned, the building of the Belt from the upper side of Audubon Park to Henderson Street, and, as far as the Louisiana Railway and Navigation Company is concerned, the first consideration was the payment of \$50,000, and the alternative consideration was the constructing of the Belt Railroad in lieu of the Frisco.

Article 1883 of the Civil Code provides:

"Every contract has for its object something which one or both of the parties oblige themselves to give, to do or not to do."

Article 1893, Civil Code:

"An obligation without a cause, or with a false or unlawful cause, can have no effect."

Article 1896, Civil Code:

"By the cause of the contract, in this section, is meant the consideration or motive for making it."

* * *

When the cause of a contract is expressed in the form of a condition, it must nevertheless be regarded as the cause of the contract.

Mack, p. 197, Sec. 182; J. 11, 20, 31; D.; XXX, 5, 1, 9; XX, 3, 2, 58.

The cause of a contract is the determining motive which induces a person to give something to another.

Mack, Sec. 181, p. 97.

Every contract must have an object about which the parties have contracted, and every commutative contract must have a consideration or a reciprocal to be given in consideration of the object of the contract. The object of the contract or the matter about which the parties are contracting can only be determined from the evidence of the parties if the contract is oral, or from the written evidence if it has been reduced to writing.

The Court in its opinion develops this so-called scheme on the part of the city to have a Belt Railroad built. It then proceeds upon the theory that every right in connection with the contract entered into by the city with the defendant rested upon a suspensive condition. While the Court does not quote the law or say so in so many words, it does

Cause of contract defined. Civil Code, 1896.

Cause of contract can only be determined from evidence of contract.

say that, as the Frisco failed to build the Belt Railroad or any part thereof, then the agreement entered into with the Louisiana Railway and Navigation Company, by which it was to pay \$50,000 for a right of way over the Belt Railroad already constructed and over the Belt reservation to Henderson Street, became a "dead-letter." Then, under the Court's opinion, this stipulated moneyed consideration of the grant must be considered as resting upon a suspensive condition which dissolves the contract of right. Wherein lies the condition? Let us examine the ordinance:

"SECTION 3. *Be it further ordained, etc., That,* whereas, under Ordinance No. 1615, N. C. S., the New Orleans and San Francisco Railroad Company, its successors or assigns, have been granted the right to construct, at their own cost and expense, the double-track Belt Line over the Belt reservation on the river front from the present end of the Public Belt on the upper side of Audubon Park to Henderson Street, and under said ordinance said company dedicates said tracks to perpetual public use; therefore, under the Belt provisions of said Ordinance No. 1615, N. C. S., and with the limitations therein, which recognize and preserve the present and future rights of the City of New Orleans over the projected Public Belt Railroad."

The "WHEREAS" or "PREAMBLE" to this portion of the ordinance simply contains a recital of facts. That recital of facts evidences that the city has granted to or permitted the Frisco to build a certain proportion of this Belt Railroad. In other words, it was a fact communicated to the defendant in said preamble that the Frisco had been granted the right to build a double-track Belt Railroad from the upper side of Audubon Park to Henderson Street, the

part of the Belt reservation over which defendant was about to be granted a right of way; but this preamble is no part of the contract, nor could it even be construed as in any manner affecting, modifying or qualifying the contract, and certainly could not be regarded as controlling the same or evidencing the intention of the parties. The principle of law that a "WHEREAS" or a declaratory clause preceding a contract, or even attached to it, does not control it is well settled.

Preamble defined
and law quoted.

"A preamble is defined as an introductory portion; an introduction or preface to a book, document, or the like."

Am. & Eng. Encyc. of Law, Vol. 22, p. 1161.

"A declaratory clause AT THE END of a contract, stating its object, is not intended to control it."

Board of Trustees vs. Campbell, 48 An. 1543.

In *Cornelson vs. Sun Mutual Ins. Co.*, 7 An. 346, the defendant offered a reward for the conviction of persons guilty of incendiarism by passing a resolution to that effect in the following language:

"*Whereas*, it is known to members of this board that frequent cases of incendiarism have occurred in this city during the past month; and, *whereas*, if the incendiaries continue undiscovered, the most destructive consequences to property may be apprehended:

"*Be it therefore resolved*, That this board authorize its secretary to offer a reward of three thousand dollars for the conviction of any free person of mature age, and two hundred dollars for the conviction of any slave, who may have been concerned, either as principal or accessory, in setting fire to any building or buildings in the State of Louisiana."

Plaintiff denounced and secured the conviction of an incendiary several months after for a crime also committed several months after the offering of the reward. Defendant contended that its offer was intended to cover only crimes prior to the offer of the reward, and invoked the express language of the preamble. The Court held against defendant.

"The words of a contract are to be understood, like those of a law, in the common and usual signification, without attending so much to grammatical rules as to general and popular use."

C. C. 1946.

"The preamble of a statute is a clause introductory to, and explaining the reason for passing, the act; it is not an essential part of the statute."

Townsend vs. State, 147 Ind. 635 (62 A. S. R. 477); see Cyc., Vol. 31, p. 1156, calling it the KEY to a statute, though not a part of it.

It was perfectly evident that the preamble in this ordinance was not intended by the parties as having any effect on the ordinance, other than to notify defendant that "over a part of this right of way I am now going to grant you the Frisco has been granted a right to build a railroad thereon, but it is to be the property of the city."

If this recital in the preamble to the ordinance was intended, or could have been intended, to have any effect whatever upon the ordinance other than as above stated, then the language of the granting portion of the ordinance would have necessarily been different. It would have been:

"The Louisiana Railway and Navigation Company is hereby granted a right of way over the

double-track Belt Line already constructed and the double-track Belt Line to be constructed by the New Orleans and San Francisco Railroad Company from the upper limits of the City of New Orleans to Henderson Street upon the following terms and conditions."

But that language is not used. The language used is:

"THE LOUISIANA RAILWAY AND NAVIGATION COMPANY IS HEREBY GRANTED A RIGHT OF WAY OVER THE DOUBLE-TRACK BELT LINE [the two miles that had been built by the Illinois Central] AND RESERVATION ON THE RIVER FRONT OF THE CITY OF NEW ORLEANS [that portion upon which no tracks had been laid; that portion lying between the ends of the tracks built by the Illinois Central down to Henderson Street]."

The above-quoted language of this ordinance is conclusive that the object of it was to grant the Louisiana Railway and Navigation Company a right of way over the double-track Belt Line already constructed over the Belt reservation to Henderson Street. The preamble notified it that on this Belt Railroad the Frisco had been given a right —was simply authorized to build the tracks, but that the tracks would belong to the city. If the tracks were built, the Louisiana Railway and Navigation Company could use them; if the tracks were not built, it would have its right of way over the reservation, and a right of way over the reservation carries with it the right to use it by building tracks thereon.

The intent was to grant a right of way for \$50,000. That was the evident intent of the grant as derived from the language used. Under that language, if nothing more had been said in the ordinance about the payment of the \$50,000 or about the Frisco having been engaged to build

a portion of the Belt, the Louisiana Railway and Navigation Company would have gone upon this Belt reservation and built its railroad down to Henderson Street. If the first condition had been expressed—that is, that it should pay \$50,000—this sum would have to be paid under the terms of the contract. In other words, if the language used in the ordinance granting to the defendant company the right of way over the Belt tracks and over the Belt reservation had simply rested upon the first consideration—that is, the payment of the \$50,000—it would have gone to work at once, built the Belt, operated its cars for a month, paid the \$50,000, and the consideration of the contract would have been complied with. Then, with reference to this first part of the consideration—this moneyed consideration—wherein exists

A SUSPENSIVE CONDITION

that dissolves it of right and justifies the Court in saying, that, if the Frisco did not build, then its failure destroyed the moneyed consideration of the contract? Let us examine the law with reference to SUSPENSIVE CONDITIONS, AND SEE WHEN IT IS APPLIED TO THIS CONTRACT WHETHER OR NOT A SUSPENSIVE CONDITION EXISTS AS TO THE MONEYED CONSIDERATION OF THIS CONTRACT.

Was the failure of the Frisco to build a suspensive condition?

Civil Code, Article 2021:

“Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happens, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition.”

Civil Code, 2021.

What is the obligation assumed in this contract that might be defeated by a condition? Is there anything in the object of the contract? What is the object of the contract? It is the granting of a right of way over, **NOT A COMPLETED BELT OVER, NOT THE BELT ALREADY COMPLETED**, but over the **BELT ALREADY COMPLETED** and **THE PUBLIC BELT RESERVATION AS ALREADY DEDICATED, DEFINED AND SET ASIDE BY ORDINANCE NO. 147, N. C. S., OF THE CITY COUNCIL OF THE CITY OF NEW ORLEANS**. When does this right or this grant take effect? Section 15 of the ordinance provides that the ordinance shall be accepted within sixty days, and when so accepted **"SHALL BE A CONTRACT BETWEEN THE CITY OF NEW ORLEANS AND SAID COMPANY, ITS SUCCESSORS AND ASSIGNS."**

Object of contract was the granting right of way over completed tracks and Belt reservation.

The grant amounted to a sale of a right of way.

So, the minute the grant, with the consideration expressed, was accepted, it became a contract between the parties. The right of use of the Belt tracks already constructed and the **RIGHT OF WAY OVER THE PUBLIC BELT RESERVATION VESTED IN THE DEFENDANT IMMEDIATELY UPON ACCEPTING THE ORDINANCE**. It was a *sale* of a right of way. Then what does the Code say?

The sale was perfect upon acceptance by L. R. & N., Civil Code 2456

"The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser, with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered nor the price paid."

C. C. 2456.

Civil Code, 2021.

"If the obligation is not to take effect until the event happen, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be

defeated when the event happens, it is then a resolutive condition."

C. C. 2021.

This contract took effect at once; therefore, if there was a condition attached to it which would have had the effect of defeating the contract, it must have been

A RESOLUTORY CONDITION,

and not a suspensive condition. If a resolutive condition exists, is the contract dissolved of right?

Civil Code, Article 2047:

"In all cases the dissolution of a contract may Civil Code, 2047. be demanded by suit or by exception; and when the resolutive condition is an event, not depending on the will of either party, the contract is dissolved of right; but, in other cases, it must be sued for, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition."

Is there a resolutive condition to the right of way over the Belt Road granted to the defendant which is dependent upon the "will of either party," and, therefore, would dissolve the contract of right? If there is, then the contract is dissolved of right. If there is not, and there is really a resolutive condition existing, it must be sued for, because the Code says that in all other cases it *must* be "sued for."

Examine the contract further and answer whether or not there is any condition, either suspensive or resolutive, as to the object of the contract, except such resolutive condition as is inherent in every commutative contract. The

language which grants the right of way over the double-track Belt line and reservation is in the language of

A PRESENT GRANT.

It requires the payment of fifty thousand dollars. The alternative consideration is the building of the Belt Railroad in the event of the failure of the Frisco to do so. This grant may have been defeated or dissolved by an action in the Courts upon the failure of the defendant to pay the \$50,000, or make the \$50,000 deposit, as it was required to make to guarantee performance.

No conditions in the sale of the right of way other than those to be found in every commutative contract.

Examine the question further. The defendant has assumed an obligation. It is an unconditional obligation to pay \$50,000 for the use of the right of way over the Belt tracks already constructed and the right of way over the Belt Reservation. The city has stipulated that it has permitted another person to build the Belt tracks over the reservation, but they are to be the property of the city. In other words, the city has stipulated that it will cause to be built the Belt tracks from the upper side of Audubon Park to Henderson Street, and for the use of these tracks the defendant is to pay \$50,000. Now, it is true the name "Frisco, its successors or assigns," is used as the party who is to build the tracks; **but just suppose, for the sake of argument, that the Frisco had done just as it did—defaulted upon its agreement to build. Suppose the city had gone on and built just as it has done, and under its contract with the defendant it had tendered the use of these tracks to defendant and demanded the \$50,000. Could the defendant have refused to pay? We answer no, because it was a commutative contract between the parties which imposed reciprocal obligations, the object of the**

If City had tendered use of tracks after their construction by City, and demanded consideration of the \$50,000 agreed upon, she could have collected same.

contract being the granting of the right of way, and the cause or consideration of the contract being the payment of \$50,000. This contract could have been enforced judicially. Therefore, it was a valid and existing contract that could have been enforced by the Courts. On the other hand, suppose that the defendant had placed its cars upon the railroad track and began to operate, just as it had the right to do under its contract, and suppose that, after it had operated for one month, the plaintiff had demanded the payment of the \$50,000 and it had refused to pay; the city could have instituted an action either to recover the \$50,000 or dissolve the contract for the failure to pay the consideration. But there is nothing in the object of this contract or in the consideration thereof which would imply a suspensive condition, or even a resolutive condition, other than that which is inherent in every commutative contract.

The cause of this contract does not rest upon a suspensive condition. The obligation of the defendant under the alternative consideration of the contract—that is, the building of the Belt upon default by the Frisco—rests upon the contingency of the failure of the Frisco to build the Belt or a part thereof. If the Frisco built the Belt, then the obligation of the defendant under the alternative consideration would never have arisen.

This obligation incurred by the defendant to build the Belt Railroad could only come into existence by the default of the Frisco to build. The obligation to build (not the cause, but the consideration of the contract) rested upon a suspensive condition.

"If the obligation is not to take effect until the event happens, it is a suspensive condition."

C. C., Art. 2021.

Civil Code, 2021.

Contract for right
of way existed
pending the hap-
pening of the con-
dition upon which
its obligation to
build depended.

While the parties were waiting for the fulfillment of this condition, did the contract granting the defendant a right of way "over the double track Belt line and reservation on the river front of the City of New Orleans, from the upper city limits to Henderson Street," exist? If so, upon what consideration? Necessarily, the \$50,000 agreed upon. Did the event upon which this conditional obligation to build the Belt by defendant happen and thereby impose the obligation upon it? Defendant says: "Yes; and I attempted to perform the obligation, and you prevented me." The city (plaintiff) says: "No. Your obligation to build never arose because I only required you to build in the event the Frisco failed without legal excuse. It failed 'with legal excuse'; therefore, you never had the right to build—in other words, your obligation to do so never arose." Then we say: "If the obligation to build never arose, our contract to receive the right of way upon paying the \$50,000 has never been affected." The consideration to pay \$50,000 was not supplanted by the alternative consideration, until the event happened which brought the obligation into existence. If the event never happened, then the obligation to build (the alternative consideration of the contract) never arose. If the obligation to build never arose, then it is the same as if it had never been written, and the consideration of the grant would be the \$50,000. Of course, it will not be contended that defendant would not have had a perfect contract for right of way over the "double-track Belt line and reservation" to Henderson Street upon paying the \$50,000 if the alternative consideration to build had never been written in the ordinance and contract. Then, if the obligation to build never arose, the first consideration was not supplanted thereby, and is still in existence.

Contract for right
of way is not affect-
ed by any condition
whatever.

Suppose the Frisco had built. The obligation on defendant's part to build would never have arisen. Suppose the event upon which rested the obligation of defendant to build had not happened, such, for instance, as the Frisco's failure to build without legal excuse, then for the same reason the obligation of defendant to build never attached.

The plaintiff has got to take the position that this alternative obligation to build the Belt in lieu of paying the \$50,000 either arose or did not arise. If it takes the position that the obligation did arise, we say: "We agree with you; the obligation did arise, and we attempted to perform same, and you prevented us. Therefore, the law regards the obligation as performed or excuses the non-performance. If you say that the alternative obligation did not arise because the city only agreed that defendant should build in the event the Frisco failed 'without legal excuse,' then this alternative consideration and obligation on the part of defendant is the same as though it had never been written, and, therefore, does not supplant the original consideration to pay \$50,000, or in any manner affect the contract."

Alternative obligation to build Belt did not arise; but if it did, the City prevented L. R. & N. from building and law regards obligation as performed.

Looking at the case from this viewpoint, does one not readily see that the stipulation "failing without legal excuse to build" was a

STIPULATION IN FAVOR OF THE DEFENDANT?

If the city was really in good faith with reference to its contract with the defendant—that is, to grant it the right of way over the double-track Belt line and reservation on the river front to Henderson Street—then why did it object to defendant building the Belt, and what right had it to object thereto? The Court seems to intimate that, if it had done so, it would have met opposition by the Dock Board,

Dock Board could not have interfered, and it would have destroyed the whole scheme. This argument is completely refuted by the reference made in another

part of the brief to the ordinance of the Louisiana Railway and Navigation Company, which meets the very objection of the Dock Board that was then being urged before the Courts. So it is perfectly evident that no one could have prevented the Louisiana Railway and Navigation Company from performing its contract except the city itself, and we claim that the city had no legal right to do so, and that the subsequent Ordinance 2683, abridging said right, is violative of the obligation of the contract, and, therefore, null. In ringing the changes on this expression, "Frisco's failure to build without legal excuse," we wish to state that this failure to build without legal excuse, if it can have any effect whatever, is only a stipulation therein which is necessarily in favor of the defendant, and might, as above shown, relieve it from performing the alternative consideration of the contract. What would have been the result if the city had insisted upon the Louisiana Railway and Navigation Company building the Belt Railroad? The Louisiana Railway and Navigation Company might have said: "I only agreed to build in the event that the Frisco failed without legal excuse, and I am relieved of that obligation."

The only theory that could be legally advanced for the annulment of an obligation which had been undertaken, on the ground that the obligee would itself perform a certain service in consideration of the obligation assumed or the thing given the obligor, is that the performance of the consideration might depend upon a condition which would relieve the person who had agreed to perform it from performing same, in which case the cause of the contract would stand without a consideration, in which event the obligee

would not be required to perform the condition, and, of course, could not take advantage of the contract. But, if said obligee insisted upon performing the condition of the obligation, notwithstanding the fact that there was a condition existing therein which would relieve him of that obligation, the grantor or obligor could not prevent him from performing the condition, and, if he did so, could not interpose that as an excuse to be relieved from the obligation.

In this connection, we desire to state the following as a fundamental principle of the law of conditional contracts:

EVERY CONDITION IN A COMMUTATIVE CONTRACT WHICH MAY PREVENT THE PERFORMANCE OF THE OBLIGATION ASSUMED BY EITHER PARTY IS A CONDITION IN FAVOR OF THAT PARTY, AND HE AT ALL TIMES HAS THE RIGHT TO WAIVE THE SAME.

So, if there is a condition in the alternative consideration of this contract which would relieve the defendant from building the Belt Railroad, that condition necessarily is in favor of him who has assumed the obligation. Who has assumed the obligation to build the Belt Railroad? The defendant. Why? In consideration of the right of way granted to it over the Belt Railroad already constructed and the Belt reservation over which it was contemplated a road would be constructed down to Henderson Street. On what condition did it assume this obligation? On condition that the Frisco failed to build the road "without legal excuse." In whose favor was this condition of the failure of the Frisco to build without legal excuse? Is it in favor of him who has assumed the obligation? Necessarily. But is the defendant asking to be relieved of this obligation on

If suspensive condition dissolves consideration of contract, the contract would be without consideration, and would for that reason be null.

Every condition that relieves an obligor is in favor of such obligor.

If a condition exists in the alternative consideration (that to build) of Defendant's contract, such condition is in Defendant's favor and can be waived.

account of the Frisco failing to build it, having a legal excuse for its failure? No; it is insisting on building, and claims that, under the ordinance, not even the Dock Board can prevent it from building, because at the time its ordinance was framed the Dock Board suit was pending, and to meet the very objection that was then being urged against the right of the Frisco to build over the property of the Port of New Orleans—that is, that part of the ordinance proposing to turn the management and control of the Belt Road over to the Frisco Railroad, which was not permitted by the agreement under which the Dock Board had given its consent—it caused to be written in its ordinance that it should have the same rights and privileges over the Belt Railroad as were given to the Frisco in paragraph 10, Section 2, of the ordinance, “except as hereinafter provided.” The clause referred to by the expression “except as hereinafter provided” is:

“And provided that, as soon as the said Belt tracks shall be completed to Henderson Street, the same shall be turned over to the immediate ownership of the City of New Orleans and to be under the control and management of the Public Belt authority.”

This provision absolutely eliminates the objection urged by the Dock Board in its action against the Frisco.

Suppose, however, that the plaintiff's contention was right, in that your defendant could not be permitted to build over the property of the Dock Board. Could the plaintiff urge this objection to the building of the Belt by the defendant and thereby defeat the obligation it had assumed? The very same question was presented to the Court in the case of *Paul Capdevielle, Mayor of the City of New Orleans, vs.*

Quotation from ordinance requiring Defendant to turn Belt over to City on completion.

Plaintiff not permitted to urge the objection that the Dock Board may object.

New Orleans & San Francisco Railroad Co., and the Court held that the city had not the right or authority to raise this objection; that the city in good faith must carry out its part of the contract.

The Court in its opinion herein says that the successful

OPPOSITION OF THE DOCK BOARD

made the ordinance with reference to the building of the Belt Railroad in consideration of the grant of the right of way therefor a dead-letter. Paragraph 32 of said opinion states in substance that, if the city had allowed the defendant to go on and do the work which the Frisco was to have done, then it would have succeeded to all the rights of the Frisco, would have been in charge of the railroad, its operation, etc.,

"and the consequences would have been that the condition subject to which the Dock Board granted permission to the Belt Railroad authorities to operate the Belt Road within the limits of the board and the whole Belt Railroad project would have become impracticable." opinion, par. 32.

The Court overlooked the part of the ordinance in ^{the court evidently} favor of defendant which has been quoted above. ^{overlooked that part} The ^{of Defendant's ordinance meeting an} fact is that this defendant was represented by attorneys, ^{eliminating objection} of Dock Board. The defendant was well aware of the contention urged by the Dock Board; that is, permitting the Frisco to operate and control the Belt for a certain length of time was violative of the agreement under which the Dock Board had agreed to permit the building of the Belt Railroad over the Dock Board property. To prevent any such contention with reference to the defendant's ordinance, it was especially provided that this defendant should succeed to the rights of

the Frisco, "except as otherwise provided," and the proviso especially states that as soon as the Belt tracks shall be completed to Henderson Street the same shall be turned over to the immediate ownership of the City of New Orleans, and to be under the exclusive control and management of the Public Belt authorities. In justice to the defendant, we do think that the Court should construe this article of the defendant's contract. It should at least not be ignored. The Court, being a court of last resort, can say that it was inoperative, or amounting to nothing, or did not obviate the difficulty encountered by the Frisco, or that its attorneys were not able to frame a provision so as to meet the objection of the Dock Board; but at least the defendant is entitled to have a consideration of that part of its contract, and be given evidence of such consideration by having same referred to in the opinion.

If the Court continues to ignore this provision of the ordinance, then we must conclude that the Court has given effect to Ordinance No. 2683, N. C. S., approved October 4, 1904, as did the Court below in the following language (Tr., p. 407, print.):

"That the grant to the Louisiana Railway and Navigation Company was a similar condition, which likewise failed, and that the Ordinance 2683, repealing the grants in both instances, was the exercise of the legal right of the city, and did not impair the obligations of the contract, and, hence, that the rights of the Louisiana Railway and Navigation Company have elapsed, and the injunction properly issued."

So, the Court giving effect to this Ordinance No. 2683, our contention is that it does impair the contract of the defendant—in fact, absolutely destroys its contractual rights,

and is violative of the Constitution of the United States, as specially pleaded in the defendant's answer.

DIVISIBILITY OF THE CONTRACT.

The Court, paragraph 29 of the opinion, uses this language:

"The right of way which the Frisco ordinance granted to the Frisco, and which defendant's ordinance granted to defendant in case defendant succeeded to the rights and obligations of the Frisco, was not over two miles, or seven miles, or any part or parts of railroad tracks, but over the 'completed Belt system.'"

Quotation from paragraph 29 of opinion says right of way was over entire Belt.

Is not the Court mistaken in this? What is the language of the Frisco ordinance as to the grant? Paragraph 10, Section 2, says:

"OVER THE DOUBLE-TRACK BELT LINE AND RESERVATION ON THE RIVER FRONT OF THE CITY OF NEW ORLEANS, FROM THE UPPER LIMITS OF THE CITY OF NEW ORLEANS TO HENDERSON STREET, UPON THE FOLLOWING TERMS AND CONDITIONS."

Quotation, par. 10 Sec. 2, Ordinance 1516.

What is the language of defendant's ordinance?

"OVER THE DOUBLE-TRACK BELT LINE AND RESERVATION ON THE RIVER FRONT OF THE CITY OF NEW ORLEANS, FROM THE UPPER LIMITS OF THE CITY OF NEW ORLEANS TO HENDERSON STREET, UPON THE FOLLOWING TERMS AND CONDITIONS."

Quoting part of Ordinance 1997.

It is true that there are stipulations in the ordinance with reference to the right of the city to grant the use of

Further use of Belt optional with railroad.

these tracks to other railroad companies down to Henderson Street, and also to grant the use of further tracks that might be built. With reference to the defendant company, however, instead of it being granted a right of way over the Belt tracks beyond Henderson Street, the ordinance makes especial provision as follows:

“(k) That, in the event said Belt tracks shall be completed to Clouet Street, and said Louisiana Railway and Navigation Company shall desire to use that portion of the Belt which may be built from Henderson Street to Clouet Street, it shall have the right to operate its trains, cars and traffic over the completed Belt upon the payment to the fiscal agent of the city, for the use and benefit of the Belt fund, of a sum which, added to the sum to be paid under Clause (a), Section 3, of this ordinance, shall make the total sum paid by said Louisiana Railway and Navigation Company equal to the cost of the construction of the Belt tracks from the upper side of Audubon Park to Henderson Street expended by the New Orleans and San Francisco Railroad Company, its successors or assigns, in the construction of said tracks from the upper side of Audubon Park to Henderson Street, as provided in Ordinance No. 1615, N. C. S.; provided, that, in the event the Belt shall be extended to Clouet Street, and that the Louisiana Railway and Navigation Company shall not avail itself of the right to pay the additional sum, as above provided, and use the Belt to Clouet Street within a period of five years from the time said Belt is completed to Clouet Street, then, and in that event, the said Louisiana Railway and Navigation Company shall pay to the Public Belt authority of the City of New Orleans the sum of thirty thousand dollars (\$30,000), the use and destination of said sum to be the same as provided for in the payment of the fifty

Part Ord. 1907.
shows conclusively
that contract only
covered right of way
to Henderson Street.

thousand dollars (\$50,000), as above provided for. Said additional payment of thirty thousand dollars shall in no wise, however, authorize the using of the Belt below Henderson Street by the said Louisiana Railway and Navigation Company."

What says the Court to this paragraph: Does that evidence a right of way over the completed Belt? To the contrary, the right of way is limited from the upper city limits to Henderson Street. It is provided, however, that the Louisiana Railway and Navigation Company may, at its option, upon payment of a further sum, use the Belt below Henderson Street in the event it is completed. The city did not know whether it would have the money to complete it. The city did not know whether any other railroad companies were coming to New Orleans, or that any other railroad company would use the Belt—simply made provision that, in the event it was completed to Clouet Street, the Louisiana Railway and Navigation Company could use it upon the payment of a certain amount of money. And the completion of the Belt to Clouet Street was not a completion of the entire Belt. In this connection we quote paragraph 28 of the opinion:

"The city did not profess to have any funds with which to build a foot of tracks, and did not propose to obligate herself to build a foot of tracks. She simply proposed to the Frisco the scheme contained in the ordinance, and the Frisco accepted the proposition as made."

Is this assertion borne out by the record? Let us examine Ordinance No. 147, N. C. S. (Tr., p. 421.) This ordinance creates the Belt Commission. This ordinance

Above quotation shows only right of way to Henderson Street contracted for.

Court says City had no funds. Par. 28.

Ordinance 147 considered.

pledges the faith of the city to build the Belt Railroad. This ordinance confers the power and authority upon the Belt Commission to build the Belt Railroad. Section 2 thereof is as follows:

Sec. 2. Ordinance
147 stating object.

"SECTION 2. That the object and purpose of the Belt Railroad Board are to acquire, own, construct, control, maintain and operate, under any and all of the provisions of this ordinance, in the name of and for the benefit of the City of New Orleans and its citizens, a Public Belt Railway in the City of New Orleans, to be located along the river front from Protection Levee to Louisiana Avenue, to St. Joseph Street, to Press Street, and to be extended around or through the city upon such streets or roadways as the City Council may designate.

"To enable the Belt Railroad Board to carry out its objects and purposes it is authorized and empowered, in the name of the City of New Orleans, to contract for, acquire, construct, establish, purchase or make any contract or agreement which will inure to the municipality of the City of New Orleans and its citizens under any and all of the provisions of this ordinance in respect to a Belt Railway system."

Section 3 dedicates a right of way on the river front sufficient in width to lay two tracks, and declares it is a Public Belt Railroad highway.

Requires construction of Belt to commence at once.

Section 4 requires that the construction of the road be commenced without delay, and says "two tracks shall be completed between Girod Street and Barracks Street on the right of way in the rear of the Cromwell shed," and then goes on to provide for the construction of other tracks, taking possession of the Schreiber Belt track or tracks, and to connect with a portion of the Belt Railroad built for the

City of New Orleans by the Chicago, St. Louis and New Orleans Railroad under Ordinance No. 15,080.

Section 7 is as follows:

"SECTION 7. That there is hereby appropriated to the Public Belt Railroad Board for the City of New Orleans, for the purposes above indicated, out of the reserve funds, and to be paid from the first sixty per cent. of the receipts in such funds each year, the sum of \$10,000 for the years 1901, 1902, 1903 and 1904, to be paid over to the Belt Railroad Board daily as collected.

Sec. 7, Ord. 147.
makes appropriation
to build Belt.

"All contracts to be made in accordance with the City Charter."

Does this ordinance evidence that the city had a scheme by which the railroads were to build the Public Belt? To the contrary, it had made an appropriation out of the city treasury, and with this appropriation it had required the Belt authorities to build certain portions of this road. It authorized the making of any contract for the purpose of carrying out the idea embodied in this ordinance. What did the city do first? It employed the Illinois Central Railroad Company to build two miles of the track. This was in consideration of certain grants or concessions made by the City of New Orleans to the Illinois Central. After completing these two miles the next contract it made was for the building of the road down to Henderson Street. This contract was not personal to the Frisco. It was immaterial with the city whether the Frisco built it or whether its successors or assigns built it, or whether it paid some third person to build it. Then the scheme of the city was not to have the railroads to build the entire Belt, but it was to grant the right of way to other railroads coming into

Mode adopted to
build Belt. City first
employed I. C. to
build two miles, and
then made contract
with Frisco.

the City of New Orleans for a moneyed consideration, just as was stipulated in the original consideration for the grant of the right of way to the Louisiana Railway and Navigation Company, in which it was required to pay \$50,000. This money which it purposed to derive from other railroads was to go into the treasury of the Belt Railroad, and used exclusively for further construction of the Belt. The city expected, if possible, to complete the Belt, and it would have completed the Belt whether another railroad contributed to it or not.

Defendant not bound
by any intention of
City not expressed.

Furthermore, what is there in the contract which binds the Louisiana Railway and Navigation Company to anything that might have been in the mind of the City Council other than what is therein expressed? What right has the Court to assert that a certain scheme existed unless that scheme is developed from the contract itself? Why has the Court the right to use this argument for the purpose of attempting to deprive the defendant of its right under the very letter of the contract? The Court states the contention of the counsel for plaintiff, and quotes articles of the contract and ordinance relied on by plaintiff to show that this contract is not divisible. We will quote some portions of the decision with reference to that matter later on. Let us take the circumstances that surrounded the contracting parties at the time the contract was entered into. When the Frisco ordinance was passed it met with tremendous opposition both from the press and the exchanges of the City of New Orleans. One of the principal oppositions urged against it (all of which will appear by the newspaper clippings filed in the record) was that the city had not required it to give security that it would perform its part of the contract with reference to the Belt Railroad? In other words, that the people of New Orleans were anxious to have the Frisco

build the Belt Railroad. The opposition to this ordinance was so violent that Capdevielle vetoed it. It was passed over his veto. He immediately instituted a suit to have it declared null. The Court found that it was a good contract, and held that the city must in good faith carry it out. Shortly after the institution of the *Capdevielle suit* the Port Commission instituted an action against the railroad company, declaring that the conditions under which it had granted the right of way over property under its control had been violated, and that, therefore, the Frisco Railroad should be enjoined from building the railroad over such property. This suit was pending at the time the ordinance of the Louisiana Railway and Navigation Company was framed. This suit, as the Court must necessarily infer (since the Louisiana Railway and Navigation Company appeared in the *Capdevielle suit* and asked to have the ordinance construed, as it expected to acquire rights thereunder), was taken cognizance of by the attorneys of the Louisiana Railway and Navigation Company and the officers of said company. The question arose: In what language shall this ordinance be framed so as to unqualifiedly and unconditionally grant to the Louisiana Railway and Navigation Company a right of way over the Belt Railroad, at least down to its river terminal, Willow Grove Landing? The parties to this contract all inferred that, if the Dock Board succeeded in its suit, it could not prevent the building of the Belt Road down to Toledano Street, and that the Frisco would at least build the Belt that far. Therefore, that being in the contemplation of the parties, it was written in the ordinance:

“(d) That, in the event the New Orleans and San Francisco Railroad, its successors and assigns, shall, from any cause, complete only a portion of the

Object of contract was for express purpose of granting right of way to Defendant to reach river front.

Par. (d), Ordinance 1997.

tracks from the upper side of Audubon Park to Henderson Street, the Louisiana Railway and Navigation Company, its successors and assigns, shall have the right to operate its own locomotives, cars and equipment over such portion of the tracks as is already built, and as may be built by the New Orleans and San Francisco Railroad Company, its successors and assigns; and for such privilege shall pay to the City of New Orleans such proportion of the sum provided in Clause (a) of this paragraph [\$50,000] as the tracks so constructed and used by said Louisiana Railway and Navigation Company bear to the whole length of the tracks from the upper city limits to Henderson Street."

And in keeping with this provision and the provision stated as a proviso, referred to and quoted before, to the effect that the operation of the Belt Railroad should be under the absolute control and management of the Public Belt authorities, was inserted for the purpose of allowing the defendant to build the Belt, or any part thereof, in the event the Frisco failed to do so.

The Court, in paragraph 39 of the opinion, states that the contracting parties had in mind:

"First, that the Frisco shall construct the entire five miles of tracks down to Henderson Street.

"Second, that the Frisco shall construct a part of the five miles of tracks, and then default in its contract.

"Third, that the Frisco shall construct no part of the five miles of tracks."

This statement of the Court is correct, except that part which says that the Frisco "shall construct a part of the

Statement of Court
as to what contract-
ing parties had in
mind.

five miles of tracks, and then default in its contract." There was no such partial default contemplated by the parties at the time the Louisiana Railway and Navigation Company ordinance was drawn, nor can it be inferred from the ordinance. As above stated, the Dock Board suit was pending at the time. The *Capdevielle* suit had been decided, in which the Court said:

"The city has not bound itself hard and fast for a stated consideration to furnish this right of way. She transferred the right she was authorized to transfer—that is, the right she owns and controls. If she did not have the authority, she did not transfer the right. As between the city and defendant, she is bound in good faith to carry out the terms of the ordinance."

With these lights before the contracting parties, then, necessarily, they contracted with reference to same, and the Court had already decided that the ordinance was valid; that the city should in good faith carry out its contract with the Frisco and accept the consideration of the grant in so far as it was able to furnish the right of way. If it could not furnish the right of way any further than Toledano Street, say, then it must furnish that right of way and permit the Frisco to discharge the obligation it was under in the consideration of the contract by building the Belt Railroad that far. If the Frisco undertook to build the road under the contract, it was contemplated that it would complete same to the extent of the city's ability to furnish the right of way; that, if the Frisco defaulted, the alternative obligation of the defendant would arise, and it would build to the extent the city could furnish the right of way.

In Paragraph 40 the Court proceeds then to eliminate the first and second contingencies and say it is the same as

though they had not been written; in fact, eliminated them from the contract.

In Paragraph 41 the Court, in speaking of what is embodied in Paragraph 40—that is, that these two contingencies were eliminated from the contract—says:

“So plain is this that confirmation of it can hardly be necessary. If such confirmation were needed, however, it would be found in the fact that defendant itself adopted and acted upon that view. It made no effort or attempt whatever to avail itself of that phase of the contract by which it was to have certain rights in consideration of a money payment; but proceeded to make the deposit called for by Paragraph (c) of the ordinance, which is the paragraph providing for the construction of the tracks in case the Frisco failed to construct any part of them. The deposit was in express terms restricted to ‘the terms and conditions of Paragraph (c).’”

Quotation from opinion says defendant acted upon Court's view, par. 46.

Defendant believed the alternative obligation imposed on it had arisen, and acted upon the belief.

We are at a loss to see how this argument supports the proposition. The defendant construed the contract to mean that it was under obligations, under ‘the alternative consideration of its grant, to build the road to Henderson Street, in the event the Frisco defaulted or failed to do so, and, thus construing its contract, it proceeded to make the deposit of \$50,000 in securities, as it was required to do, and would have completed the Belt if it had not been prevented from doing so by the city.

In Paragraph 42 the Court seems to assert that defendant understood perfectly that, if the Frisco failed to build the tracks, then that it had no further rights under the contract with reference to the money consideration. This is true, if the obligation under the alternative consideration of the contract (that to build) ever arose. Until it did arise,

the contract was complete, the right of way was granted and was vested in the defendant. If the obligation to build did arise, as contended for by defendant, then the preventing of performance by plaintiff places the defendant in the same position before the Court as though it had performed the obligation or the law excused nonperformance. (C. C. 2040.) If the obligation did not attach on account of the Frisco, as contended by plaintiff, having a legal excuse for not building, then the alternative consideration is the same as not written, and the contract rests upon the moneyed consideration of \$50,000. The defendant said to the city: "The Frisco has failed to build these tracks; we are now ready to build them; in other words, we are ready to carry out the alternative consideration of the contract." But the city says: "We will not permit you to build them." The defendant says: "Under the law your refusal to permit us to build these tracks causes the contract on our part to be considered as performed, and we are entitled to the use of the tracks built by you. But we are willing to do more; we are willing to stand upon the first consideration of the contract, and as you refused to permit the alternative consideration to be executed, it is the same as though it had not been written. Although we might have the use of the tracks without the payment of anything, nevertheless we are willing that our right rest upon the absolute grant given us upon consideration of the payment of \$50,000."

The Court, in using this argument above stated, though, does admit that, under the Frisco ordinance, it had the right to build a part of the Belt—that is, that part of the Belt to which the city could furnish a right of way. Then the Court says that the defendant succeeded to all the rights of the Frisco. Now, the Court being correct in stating that the Frisco had the right to build a portion of the Belt, and,

as the Court says, the defendant succeeded to all the rights of the Frisco, then did not the defendant also have the right to build part of the Belt? In other words, isn't this very argument conclusive on the proposition that this right to build the Belt or any part of it to which the city could furnish a clear right of way was contemplated by all parties and shows absolutely that the contract, with reference to the right of way over the Belt, was divisible?

Further arguing the question of the indivisibility of the contract, the Court quotes Paragraph (c) of the ordinance. That portion of the paragraph which the Court discusses we will reproduce as follows:

"And provided, further, that said Louisiana Railway and Navigation Company shall, on July 1, 1904, deposit with the fiscal agent of the City of New Orleans bonds or other securities satisfactory to said fiscal agent of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company with the foregoing obligation, and to be returned to said company when said company shall have built and completed said Belt tracks from the upper side of Audubon Park to Henderson Street; and, provided further, that in case said company shall be prevented from building said Belt tracks, or any portion of the same, on account of the city not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said fiscal agent."

The Court, commenting upon this paragraph, uses the following language:

"51. It will be observed further that the inability of the city to furnish the right of way for a por-

(c), Ordinance
7.

ation from
n, par. 51.

tion of the tracks would not have been reason for returning the entire \$50,000 deposit if, as is contended, the contract was to continue in full force and effect for that part of the tracks for which the city would be able to furnish a right of way. If the idea had been that the contract should thus remain in force for part, the retention of a proportional part of the \$50,000 security would have been stipulated. Why return the whole security if the whole contract was not to be at an end? No, the reason why the entire deposit was to be returned in case any portion of the tracks could not be constructed on account of the inability of the city to furnish the right of way, was that the contract was in that event to be at an end; it was indivisible; it called for the construction of the whole five miles of tracks, or none. If any part of the five miles of tracks could not be constructed on account of the inability of the city to furnish the right of way, then the whole contract fell through, and the whole deposit which had been made to secure its execution would have to be returned." Court says sections or a part should have been retained if defendant allowed build part of Belt

In reply to this we ask the question: Why should the city retain any part of the \$50,000? This \$50,000 was to be put in the hands of the fiscal agent of the City of New Orleans as a guarantee or as surety that the Louisiana Railway and Navigation Company would build the Belt Railroad from the upper side of Audubon Park to Henderson Street in the event of the failure of the Frisco. It, of course, would get back, or have returned to it, the \$50,000 when it had complied with the contract. What does the city agree shall be a compliance with the contract, and under what contingency then will it return the \$50,000? The ordinance answers the question. It says: Fallacy of for ing argument

"That in case said company shall be prevented from building said Belt tracks, or any portion of the

same, on account of the city not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said fiscal agent."

City furnished
right of way to Hen-
derson Street, and
defendant built
Belt, the securities
\$50,000 deposited
guarantee per-
formance would be
returned. If a part
as built, and City
failed to furnish re-
mainder of right of
way, contract con-
sidered as performed
and securities re-
turned.

In other words, if the city furnishes a right of way to Henderson Street, and the road is built by the Louisiana Railroad and Navigation Company to that point, then the contract has been complied with and the security (\$50,000) is to be returned. If it builds only a portion of the Belt Railroad, and is prevented from building the remainder on account of the city not being able to furnish the right of way, or on account of causes beyond its control, then it will be considered as having complied with its contract and the \$50,000 will be returned. Suppose this clause had required the Louisiana Railway and Navigation Company to furnish a surety bond for the faithful performance of the obligation, the city to furnish the right of way, and by its failure to do so, or for some cause beyond the control of the defendant, it is not able to build the road entirely to Henderson Street, but builds it over that portion of the Belt to which the city does furnish a right of way. Could either logic, reason or any rule of construction make such a provision read that the city would be authorized to retain any part of the \$50,000 or the city would be authorized to hold the surety any further after the obligation had been performed as therein stipulated? The very fact that the city agreed with the Louisiana Railway and Navigation Company that if "you build all of this road to Henderson Street we will return you the securities, because your contract has been complied with, or if you build only part of the road and are prevented from building the remainder on account

of 'my not furnishing the right of way,' then your obligation is performed, and the securities shall be returned," is conclusive proof of the fact that in contemplation of the parties THIS ROAD WAS TO BE BUILT TO WHATEVER LENGTH THE CITY COULD FURNISH THE RIGHT OF WAY DOWN TO HENDERSON STREET. The construction placed upon this portion of the ordinance—that it was at all times in contemplation of the parties that the Louisiana Railway and Navigation Company would build whatever part of the Belt Railroad it had the right to build on the right of way furnished by the city, and that they had in contemplation the reaching of the defendant's terminals on the river front—is made apparent by the language used in Section 5, the latter part thereof being as follows:

"THE SAID COMPANY SHALL ALSO HAVE THE RIGHT TO CONNECT, BY ALL NECESSARY AND CONVENIENT SWITCHES AND TURNOUTS, ITS PROPERTY AND TERMINALS ON THE MISSISSIPPI RIVER NOW ACQUIRED, OR HEREAFTER TO BE ACQUIRED, WITH THE DOUBLE-TRACK BELT LINE AND RESERVATION ON THE RIVER FRONT OF THE CITY."

Sec. 5, Ord.
grants right of
from Defend
river terminal
Belt R. R.

Underlying this is the further principle of law that the City of New Orleans having granted to the defendant the right of way from the Belt Reservation on the river front

to its river terminals, could not prevent it from exercising this grant, even if it became necessary to pass over the Belt.

It is presumed that they had in contemplation this principle of the law at the time this contract was entered into because there were lawyers handling the proposition on both sides, and this principle of law will further aid the Court in coming to the correct conclusion upon the interpretation of the contract as to the right of the Louisiana Railway and Navigation Company to build the whole Belt to Henderson Street, or any part thereof to which the city could furnish a clear right of way.

The Court, in Paragraph 50, says:

"It will be observed again that there never was any doubt whatever of the city's ability to furnish all that part of the right of way down to the point at Toledano Street where the Belt Road would have to enter upon the territory of the Dock Board, and that, consequently, the stipulation of the \$50,000 deposit having to be returned in case the defendant was prevented from building said Belt tracks, or any portion of same, on account of the city not furnishing the right of way, could have reference to nothing else than to the inability of the city to furnish the right of way over the Dock-Board territory."

This paragraph of the opinion is the prelude to the part above quoted and which we have argued. Now, if the Court finds that there was never any doubt about the city furnishing the right of way to any portion of the territory except that over which the Dock Board had control, then is it not conclusive that in contemplation of the parties the very territory that the Dock Board was then contending that the

50. opinion.
City had
right of way except
property of
Commission.

above quotation
Shows,
very territory
which City might
be able to get
right of way was
property of Dock
Board.

Frisco had no right to build over was the very territory in contemplation of the parties when they said:

"That, in case said company shall be prevented from building said Belt tracks, or any portion of the same, on account of the city not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said fiscal agent."

That being the case, then, certainly, they contemplated as above argued, that, when the Louisiana Railway and Navigation Company had built down to the point when the city was no longer able to furnish a right of way, then its obligation had been fulfilled, and the securities deposited to guarantee the faithful performance of the contract would be returned.

Again, if there was never any doubt about the city furnishing a right of way to any property except that under control of the Dock Board, then is it not apparent that the parties had this in mind and that the Frisco, on account of the Dock Board's opposition, might build only a portion of the Belt when the following paragraph was written in defendant's ordinance:

"(d) That in the event the New Orleans and San Francisco Railroad Company, its successors and assigns shall, from any cause, complete only a portion of the tracks from the upper side of Audubon Park to Henderson Street, the Louisiana Railway and Navigation Company, its successors and assigns, shall have the right to operate its own locomotives, cars and equipment over such portion of the tracks as is already built, and as may be built by the New Orleans and San Francisco Railroad Company, its

successors and assigns, and for such privilege shall pay to the City of New Orleans such proportion of the sum provided in Clause (a) of this paragraph (the \$50,000) as the tracks so constructed and used by said Louisiana Railway and Navigation Company bear to the whole length of the tracks from upper city limits to Henderson Street."

SUMMARY.

This case has consumed a great deal of the Court's time, both the trial and Supreme Courts. The plaintiff wrote elaborate briefs in support of its contention. The defendant answered by briefs not altogether so elaborate, and the Court has handed down an opinion of twenty-four pages of typewritten matter. We have applied for a rehearing, and, while we feel that we could have summed up the case in a very few pages, yet we felt that we were called upon to a certain extent to answer a great many minor contentions of the Court. But, in conclusion we desire to restate the propositions involved in the litigation, and upon which the case must be decided. They are simple. They are, it seems to us, when correctly construed, capable of easy analysis.

The proposition before the Court is the construction of a commutative contract. The city granted to the defendant a right of way over the Belt Railroad constructed and over the Belt reservation. This grant was made on what is called a condition, but is really the consideration of the contract. It is the payment of \$50,000. This is an absolute contract. It is enforceable in the courts. Upon accepting same, the right of way over the Belt Railroad immediately vested in the defendant. This contract could only be set aside by an action in the courts or by a further stipulation in the contract. There was a further stipulation—an alternative con-

The whole question before Court is construction of commutative contract.

sideration. This alternative consideration was under a certain contingency to supplant the moneyed consideration. The obligation under same rested upon a future event, the failure of the Frisco to build without legal excuse. It, therefore, rested upon a condition. The alternative obligation to build did not take effect until the happening of the event—that is, the failure of the Frisco to build without legal excuse. Did the event happen? The defendant says:

“Yes, and I attempted to perform the alternative consideration of the contract in good faith, and you [the city] prevented me from doing so by injunction; therefore the Court regards the contract as performed.”

Civil Code, Article 2040:

“The condition is considered as fulfilled when the fulfillment of it has been prevented by the party Civil Code, Contract con as fulfilled bound to perform it.”

“When one party offers to perform a condition other party vents its p precedent and is prevented by the other, the offer will be treated as performance, and the conduct of the other party as excusing performance.”

De La Vergne vs. New Orleans & Western R. R. Co., 51 An. 1733, Syllabus 2.

The city says:

“No; your obligation to build the Belt under this alternative consideration never arose, and you have no right to build. You have assumed no obligation to build it, and you therefore have no right to build it.”

The defendant answers this by saying:

“If that is a fact, if my obligation to build the Belt never arose, then my right to use the Belt **which you have built** rests upon the first consideration of the contract—that is, the payment of the \$50,000.”

defendant pleaded
that it was willing
to pay \$50,000,
first consideration
of its contract, for
use of Belt, and
asks Court to so
decree.

It has said, further, in its answer to the city, and it has said so to the Court, both in pleadings and brief, that it is ready to pay the \$50,000, and the \$50,000 in securities now in the hands of the Fiscal Agent of the City of New

Orleans can be accepted as its security for the payment of the debt. This is clear. It is logical. The conclusion from it is irresistible—that is, that the defendant is entitled to a judgment in its favor, decreeing its contract with the City of New Orleans granting to it a right of way over the Public Belt Railroad and reservation on the river front is a valid and subsisting contract, and that it has the right to use the Belt either by the payment of the \$50,000 or the reasonable cost of construction. It is immaterial with defendant which consideration it may have to pay.

Before closing this brief, as a final illustration of the exact case before the Court, we give the following:

John enters into a contract with Paul in the following language:

Example given.

"Whereas, I, John, the undersigned, own a lot in the City of New Orleans, and, whereas, I have contracted with William Jones, his successors or assigns, to erect thereon a house of a certain size, the plans of which are hereto attached, Paul is hereby granted the right of use of said house for a period of ten years upon the following terms and conditions:

"(a) That, when he shall have used the said house for a period of one month, he shall then pay the undersigned \$1,000, which shall be the consideration of the lease, etc.

"(b) That, in the event of William Jones, his successors or assigns, failing, without legal excuse, to build said house on or before January 1, 1910, Paul shall complete the same. Such construction of said house shall be in lieu of the payment of the \$1,000 referred to in paragraph (a) of this contract."

William Jones fails to build the house. Paul attempts to build it, and John enjoins him. Pending the injunction, John builds it himself. Would Paul have the right to use it under the contract? Propound that question to the next law student who appears before your Honorable Court, and if he should answer that Paul would not be entitled to enforce his contract for the use of the house, we believe you would find that he was not sufficiently versed upon the law of contracts. This is the identical case before the Court. The contractual rights of the parties are clear, and they are easy of solution. The law of the case, when applied, we believe, will justify the Court in setting aside its former decree, granting a rehearing herein, and, finally, in rendering judgment in favor of the defendant, for all of which it accordingly prays.

Conclusion.

Respectfully submitted,

FOSTER, MILLING, BRIAN & SAAL,
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Attorneys for Defendant-Appellant.

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JAMES D. MAHER
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1913.

No. 49.

LOUISIANA RAILWAY AND NAVIGATION COMPANY,
Plaintiff in Error,
versus

MARTIN BEHRMAN, MAYOR OF THE CITY OF NEW
ORLEANS, *Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF
LOUISIANA.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN
ERROR OPPOSING MOTION TO DISMISS
WRIT OF ERROR *and on Merits*

FOSTER, MILLING, BRIAN & SAAL,
WISE, RANDOLPH & RANDALL,
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M. J. FOSTER,
R. E. MILLING,
Nov. 3, 1914.

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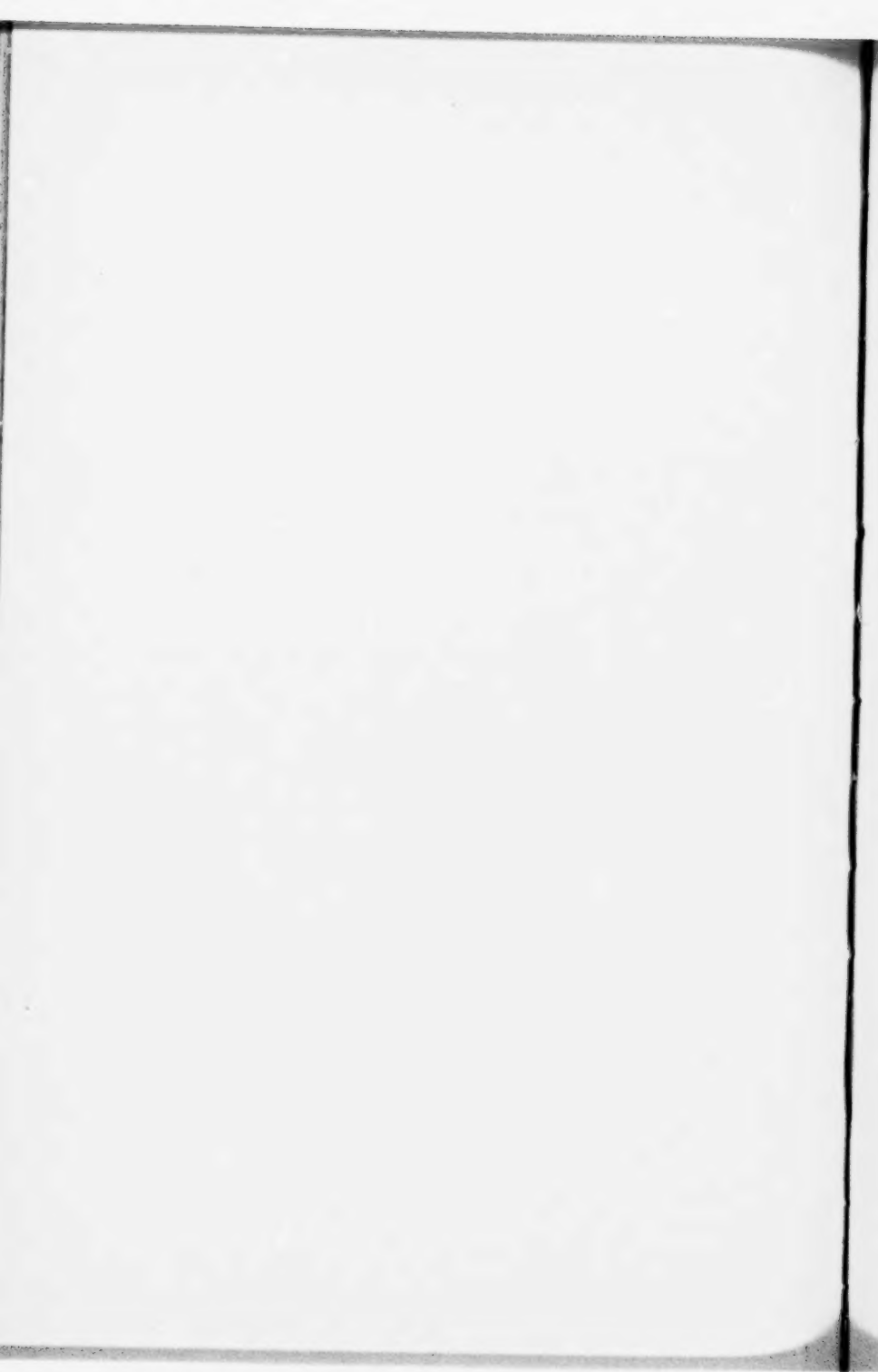
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SYLLABUS.

1. When a contract right springs from a legislative enactment and that right has been taken away or abridged by subsequent legislation, on writ of error from the Court of last resort of a State, the jurisdiction of the Supreme Court of the United States attaches, and this is true even when the State Court rests its decision on the invalidity of the prior statute and ignores the subsequent enactment. The Supreme Court in such case is authorized to examine the record to determine the validity of the prior statute. *McCullough vs. Virginia*, 172 U. S., 102; *Carondelet Canal Co. vs. Louisiana*, 233 U. S., 362, 377; *Story on the Constitution*, 1391; *State of Louisiana et rel Hubert vs. Mayor*, 215 U. S., 170; *Wolff vs. New Orleans*, 103 U. S., 358.

2. A contract of a municipality granting the use of rail tracks (tracks existing and others to be constructed) for a money consideration, and an alternative consideration requiring the company to construct the tracks not yet built in lieu of the money consideration in the event they are not built by the person already under contract to construct them, does not rest on a suspensive condition—a condition precedent; it is purely a commutative contract and controlled by the general law of contracts. La. C. C., Arts. 2021, 2022, 2024, 2027, 2028, 2034, 2035, 2037, 2040, 1768. *Guyden vs RR Co* 89 N 269



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ERROR OPPOSING MOTION TO DISMISS
WRIT OF ERROR.**

May it please the Court:

The defendant in error has moved to dismiss the writ herein upon the grounds:

First: That no federal question has been passed upon by the Court below;

Second: That the opinion of the Supreme Court of

Louisiana is broad enough to decide the case without regard to the federal question raised.

This motion to dismiss was submitted on briefs at the close of the last term of your Honorable Court, was referred to the merits and we understand will be considered by the Court on the final decision of the case. This brief is intended as a supplemental brief on motion to dismiss and a brief on the merits of the cause.

ON MOTION TO DISMISS.

We understand the jurisdiction of the Supreme Court of the United States attaches to the decisions of courts of last resort of the States:

First: When a federal question has been raised and passed on adversely to the contentions of the complainant by the Court of last resort of the State, provided there is no controlling local issue decided sufficient to support the decree.

Second: When a federal question is raised but not directly passed on by the State Court, if the decision of such question is necessary for the determination of the cause.

Third: When a contractual right springs from a legislative enactment and that right has been taken away or abridged by subsequent legislation. And this rule prevails even when the State Court rests its decision on the invalidity of the prior statute and ignores the subsequent enactment.

In order that the Court may be able to apply these rules we find that the jurisprudence authorizes the Court to examine the record presented to determine:

(A) *If a federal question is raised by the pleadings or is fairly presented by the face of the record;*

(B) *If the determination of the federal question is necessary for decision of the case;*

(C) *If a contract really existed under a prior statute declared invalid by the State Court, when a subsequent statute exists repealing the prior statute or abridging the right; this for the purpose of determining whether or not effect has been given to the prior statute.*

The federal question involved in the case at bar briefly stated is:

The City of New Orleans granted to the plaintiff in error a right of way over its belt railroad constructed and its belt reservation, upon which a railroad was to be constructed on the river front of the City of New Orleans from the upper city limits to Henderson Street, for a certain consideration expressed in the ordinance. This ordinance granting the right was practically repealed or the right granted annulled by a subsequent enactment known as Ordinance No. 2683 and a subsequent resolution of the Board of Port Commissioners of the City of New Orleans approving this ordinance, which ordinance and resolution absolutely prohibits the granting of a right of way to a railroad over the belt tracks or the use of such tracks by any railroad company.

Our contention is that this case comes clearly within the principles enunciated in the case of *McCullough vs. Virginia*, 172 U. S., p. 102.

In that case there was an enactment of the Legislature of Virginia passed in 1871 funding the bonded indebtedness of the State and making all interest coupons a valid tender for the payment of the taxes due the State. This statute was declared valid by the Court of last resort of Virginia. Afterwards the Legislature enacted a law which prohibited the Collector of Taxes from receiving anything other than gold, silver, greenbacks, bank notes, etc., in fact, money in its common acceptance, for taxes. The holders of coupons asked the aid of the Court to force their ac-

ceptance for taxes. The Virginia Court reversed prior rulings and held the statute of 1871 invalid as far as it related to the coupon provision, and thereupon dismissed the claim; but entirely refrained from passing upon the subsequent statute. The Court looked into the case for the purpose of ascertaining the validity of the prior statute in order to determine its jurisdiction.

In order that the similarity between the cited case and the case at bar may more strikingly appear, we desire to make a fuller

STATEMENT OF THE CASE AT BAR.

Some twelve or fifteen years ago, the City of New Orleans conceived the idea of a Public Belt Railroad passing around the river front of the City of New Orleans for the equal use and benefit of all railroads entering that city, thereby preventing the appropriation of the entire river front by a few of the larger railroads. With this end in view, it passed, in 1899, Ordinance No. 15,080 C. S. (Tr., p. 236), by which it granted certain rights and franchises to the Chicago, St. Louis & New Orleans Railroad Co., on condition that this company would build for it the belt tracks from the upper city limits down to Audubon Park, a distance of about two miles, and by that and subsequent ordinances laid out upon the river front a right of way for the construction of the belt railroad. This right of way passed inside of the levee in most instances, but at a few points the conditions were such that it was necessary to pass over the levee and along the wharves in order to get space for construction. The jurisdiction of this property is under the control of what is known as the Port Commission of the City of New Orleans, commonly called the Dock Board, and will hereinafter be referred to in that way. So the Council of the City of New Orleans, being con-

fronted with this condition, passed Ordinance No. 147 N. C. S. (Tr., p. 254), referred it to the Dock Board, which body approved the ordinance by resolution on August 12, 1902 (Tr., p. 284). Under this ordinance and its approval by the Dock Board the ownership, control, and management of the Belt Railroad was at all times vested in the Commission appointed for its management. Under such ordinances and resolutions, however, the City Council had the authority to permit the trains of railroads to be run over the tracks, provided they were run under the control and management of the Belt Railroad Commission.

The City Council, having full authority to make any contracts for the purpose of constructing the belt, it passed Ordinance No. 1615 (Tr., p. 243), granting to the New Orleans and San Francisco Railroad Co. a right of way over the public belt railroad and reservation on the river front, reserving the right to give a similar grant to other railroads, the consideration of this grant being that the railroad company would construct and, at the end of a certain length of time, turn over to the City of New Orleans about five miles of the belt road. The validity of this ordinance was assailed by an action on the part of the Mayor, which ordinance was passed over his veto, and the Supreme Court declared that the contract as between the railroad company and the city was a valid contract and must in good faith be carried out. (*Capdevielle vs. New Orleans & S. F. R. Co.*, 110 Louisiana Reports, p. 904.)

While this case was pending on rehearing, plaintiff in error filed an application with the Supreme Court asking the Court to make clear the decision on certain points, and one of the points was particularly the right of the City of New Orleans to grant a right of way over a portion of the belt and whether or not that right existed prior to the completion of the belt by the New Orleans and San Francisco

Railroad Co. under its ordinance (Tr., pp. 333-334). The Court in its opinion on rehearing (110 Louisiana Reports, p. 922, *et seq.*), answered that question in the affirmative. It was very important to have this point made clear by the decision of the Court, for at the same time there was another suit pending before the State Supreme Court by the Board of Port Commissioners against the City of New Orleans and the Railroad Co., to have the ordinance No. 1615 declared void insofar as it authorized the construction of tracks upon the wharves on the river front under the control of said Board, which contention was upheld by the decision of the Supreme Court in 112 Louisiana Reports, p. 1011, *Board of Com'rs. vs. New Orleans & S. F. R. Co.*

After the case of Capdevielle had been decided sustaining the validity of the ordinance of the New Orleans and San Francisco R. R. insofar as the contract existing between it and the City ordinance 1997, granting to plaintiff in error a right of way over the Belt R. R., now the subject of controversy, was passed by the City and accepted by the defendant. While the principal consideration of that contract for the right of way over the Belt Railroad constructed and over the Belt reservation on the river front was \$50,000, yet an alternative consideration was written therein, that is, in the event that the New Orleans and San Francisco Railroad Company should fail to build the railroad under the terms and conditions of its ordinance without legal excuse for so doing, then that the defendant company, the plaintiff in error, would build the road in lieu of paying the \$50,000, in which event it succeeded to all the rights and prerogatives granted to the New Orleans and San Francisco Railroad Company under its ordinance 1615, *except*, that as soon as the road was completed it should be turned over to the entire ownership and control of the

Belt Commission of the City of New Orleans, which proviso absolutely eliminated the objection of the Dock Board and brought the case squarely within Ordinance 147 (transcript, p. 254), and the resolution of the Dock Board approving the same (Tr., p. 284).

As this litigation consumed some year or more, the Council for the City of New Orleans, on March 3, 1903, passed a resolution fixing the termination of the litigation as the time for the running of the delay in which the railroad should be built (Tr., 337). When all the litigation was over and within the time required under the ordinance, the plaintiff in error deposited with the fiscal agent of the City \$50,000 in securities to guarantee the performance of its contract with reference to the Belt Railroad. It waited until the time expired in which the Frisco could have built the road if it wished to do so and when that time expired it proceeded to repair the existing two miles of track with a view of carrying out the alternative consideration of the contract, that is, to construct the Belt Railroad to Henderson Street. When this was attempted its laborers were arrested by the city authorities and shortly thereafter this injunction proceeding was instituted.

From this action on the part of the city it is perfectly apparent to the Court that the City had changed its mind in regard to its desire to have the company construct the Belt Railroad in lieu of paying the \$50,000. This action is made further apparent from the fact that on October 4, 1904, some time before the above arrest, the City had passed Ordinance 2683 (transcript, page 268) and declared therein that the Belt Railroad was irrevocably dedicated to the people of the City of New Orleans for their *perpetual* and *exclusive* use and was put under the exclusive ownership and control, etc., of the Public Belt Railroad Commission and repelled Section 5 and 8 of Ordinance 147. The Dock

Board approved this ordinance and wrote in their resolution of approval that the same should remain in force "*only as long as the Public Belt Railroad is exclusively operated, managed and controlled by the Public Belt Railroad Commission, and that no rights or privileges are granted to any railroad company to control, manage or operate on said tracks.* * * *"

The subsequent enactments by the City Council and the Dock Board are the subsequent enactments which annul the contract in controversy and make it impossible for the plaintiff in error to exercise the right of way granted it over the Belt Railroad and Reservation under Ordinance 1997.

So let us proceed to argue the question with a view of determining the Court's jurisdiction.

FIRST.

Was a Federal Question Raised in the Court Below?

We answer this question by quoting from the petition of defendant in error.

Tr., p. 8, print:

"That said ordinance No. 1997, New Council Series, has never been approved, ratified or confirmed by the Board of Commissioners of the Port of New Orleans, but, on the contrary, is contrary in letter and spirit to the resolutions of the Board of Commissioners of the Port of New Orleans, approving, ratifying and confirming Ordinance No. 147, New Council Series."

Tr., pp. 10, 11, print:

"Petitioner further avers that the City of New Orleans has complied with, has executed and is executing Ordinance No. 147, New Council Series, and Ordinance No. 2683, New Council Series, and is at

this time in possession of the outer half of the neutral ground of Leake Avenue and connecting streets between the upper line of Audubon Park and Henderson Street, and has at this time actually constructed and is constructing the Public Belt Railroad tracks on the outer half of said neutral ground," etc.

Your plaintiff in error (defendant in the Court below), in reply to this cause of action set forth in the petition of plaintiff below, answered as follows (Tr., p. 30, print):

"Your defendant further shows with reference to Ordinance No. 2683, N. C. S., which was amendatory to Ordinance No. 147, N. C. S., and is pleaded by plaintiff in support of its cause of action herein, that said ordinance was passed after Ordinance No. 1997, N. C. S., was accepted by your defendant, and after same had become a valid and binding contract between respondent and the City of New Orleans, and that any resolution or ordinance of said Council passed subsequently can not affect the rights of your defendant; and, if the Court attempts to attach weight to same, or in any manner to construe the same so as to affect the right of your defendant, then it is giving effect to a law which impairs the obligation of the contract of your defendant; it attempts to divest vested rights, and is in violation of Articles 2 and 166 of the Constitution of the State of Louisiana and of Section 10, Article I, of the Constitution of the United States. Your defendant pleads the unconstitutionality of said ordinance and such interpretation as being repugnant to Articles 2 and 166 of the Constitution of the State of Louisiana, and especially of Section 10, Article I, of the Constitution of the United States."

From these allegations it is perfectly apparent that the federal question was raised by the pleadings. In fact, we do not believe that this point is controverted by the defendant in error.

SECOND.

Was this federal question thus raised passed upon by the Supreme Court of the State of Louisiana or was it necessary to pass upon same for a determination of the case?

Our first contention is that the federal question was passed upon by the Court below—in fact, that the subsequent statute enacted is the basis of the decision. This case was tried by the District Court for the Parish of Orleans, which Court rendered a written opinion and held in the concluding paragraph as follows (Tr., p. 407):

“The Court concludes that this grant to the N. O. & San Francisco R. R. Co. was a contract with a suspensive condition, and that the event did not happen within the time fixed. That the grant to the La. Railway & Navigation Co. was a similar condition which likewise failed, and that the ordinance 2683, repealing the grants in both instances, was the exercise of the legal right of the city and did not impair the obligations of the contract, and, hence, that the rights of the Louisiana Railway & Navigation Company have elapsed and the injunction properly issued.”

The judgment of the District Court was affirmed. An affirmation of that judgment carries with it, to a certain extent at least, an affirmation of the reasons on which it is based, as the reasons up to the conclusion of the opinion of the District Court and that of the Supreme Court are very similar. In the District Court's opinion there will be found the further language (Tr., p. 398):

“On January 8, 1905, Ordinance No. 2683, N. C. S., was approved by the Port Commission, with the reservation that the approval should remain in force only as long as the public belt railroad is exclusively operated, managed and controlled by the Public Belt Rail-

road Commission, and as long as no privileges are granted to any railroad company, to control, manage and operate on said tracks.

On July 17, 1905, the Board of Commissioners of the Orleans Levee District approved a resolution containing similar reservations.

Both of these Boards so approving, without protest of any kind from the Louisiana Railway & Navigation Company.

On July 1, 1905, the first spike was driven in the new belt system under Ordinance No. 2683, without protest or objection on the part of the Louisiana Railway & Navigation Company, under either one of the alternative conditions contained in Ordinance No. 1997."

In the Supreme Court's decision we find the idea expressed in the following language (Tr., p. 427, print):

"But the city had, in the meantime, in October, 1904, thirteen months before the date of the deposit, passed an ordinance reorganizing the Belt Road Commission, and making adequate financial and other provision for the construction and operation of the belt, and repealing all conflicting ordinances. Against that action on the part of the city, defendant had made no protest; although defendant could not but have known it, since the measure had attracted a great deal of attention; in fact, had been looked upon as so important as to constitute an epoch in the industrial life of the city, and had been celebrated as such by a mass meeting at which speeches were made."

From these extracts of the opinion of the two Courts it would seem that the federal question raised by the pleadings was to a certain extent at least passed upon by the State Court. But we do not rely in this case on the theory that the federal question was directly decided by the Supreme

Court, though it was thus decided by the District Court, but we do rely upon the proposition that the *subsequent enactment was given full force and effect by the Supreme Court in its opinion in declaring the original ordinance void and inoperative insofar as it granted a right of way to the plaintiff in error over the belt railroad.*

COURT'S JURISDICTION.

In order to determine the court's jurisdiction in this case it will be necessary, and the Court is authorized under the *McCullough vs. Virginia* case cited above, to look into and determine the question as to whether or not a valid contract was entered into between the City of New Orleans and the plaintiff in error under Ordinance No. 1615, so as to ascertain whether the Court's decision gives effect to the subsequent enactment (Ordinance 2683 approved by the resolution of the Dock Board each above referred to).

It is contended by defendant in error that the construction placed upon the ordinance evidencing the contract by the Louisiana Court must be accepted by this Court and therefore further inquiry is not necessary or permissible. We will answer this contention by a quotation from case above cited *McCullough vs. Virginia*, 172 U. S., 109:

"Secondly. It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the Court of Appeals of Virginia upon the act as the law of that State. While it is undoubtedly the general rule of this Court to accept the construction placed by the Courts of a State upon its statutes and constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in *Jefferson Branch Bank vs. Skelly*, 1 Black, 436, 443, in which the

Court, speaking by Mr. Justice Wayne, gave these reasons for the exception:

"It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State, whenever such a Court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use could the appellate power be to the litigant who feels himself aggrieved by some particular State legislation, if this Court could not decide, independently of all adjudication by the Supreme Court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and can not be sustained by any course of reasoning, that this Court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter, when it entertained a different opinion.' The doctrine thus announced has been uniformly followed. *Bridge Proprietors vs. Hoboken Company*, 1 Wall., 116, 145; *Wright vs. Nagle*, 101 U. S., 791, 793; *McGahey vs. Virginia*, 135 U. S., 664, 667, in which, in reference to this very contract, it was said: 'In ordinary cases the decision of the highest Court of a State with regard to the validity of one of its statutes would be binding upon this Court; but where the question raised is, whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this Court, under the Constitution of the United States and the Acts of Congress relating to writs of error to the judgments of State Courts,

to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the State Courts in relation thereto.' See also *Douglas vs. Kentucky*, 168 U. S., 488, 501, and cases cited therein."

Wolff vs. New Orleans, 103 U. S., 358;

State of Louisiana Ex Rel Hubert vs. Mayor, City of New Orleans, 215 U. S., 170, confirming *McCullough vs. Virginia* with further citation of authorities.

In this same connection we desire to quote further from the same opinion, *McCullough vs. Virginia*, p. —, on the question of the right of the Court to ascertain whether a federal question was involved when the same was not directly passed upon by the State Court:

"Fourthly. It is urged that this Court has not jurisdiction of this case for the reason that the Court of Appeals in its opinion does not consider the subsequent legislation passed by the State with the view of impairing the contract created by the Act of 1871, but limits itself to a consideration of that Act, and adjudges it void. In support of this proposition the rule laid down in *New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*, 125 U. S., 18, 38, reaffirmed in *Huntington vs. Attrill*, 146 U. S., 657, 684, and *Bacon vs. Texas*, 163 U. S., 207, 216, is cited.

In this last case the doctrine is summed up in the following statement:

'Where the federal question upon which the jurisdiction of this Court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the Constitution, and so as to give this Court Jurisdiction on writ of error to a State Court.

by some subsequent statute of the State which has been upheld or effect given it by the State Court. *Lehigh Water Co. vs. Easton*, 121 U. S., 388; *New Orleans Water Works Co. vs. Louisiana Sugar Refining Co.*, 125 U. S., 18; *Central Land Co. vs. Laidley*, 159 U. S., 103, 109. * * * If the judgment of the State Court gives no effect to the subsequent law of the State, and the State Court decides the case upon grounds independent of that law, a case is not made for review by this Court upon any ground of the impairment of a contract. The above cited cases announce this principle.'

It is true the Court of Appeals in its opinion only incidentally refers to statutes passed subsequent to the Act of 1871, and places its decision distinctly on the ground that that Act was void insofar as it related to the coupon contract, but at the same time it is equally clear that the judgment did give effect to the subsequent statutes, and it has been repeatedly held by this Court that in reviewing the judgment of the Courts of a State we are not limited to a mere consideration of the language used in the opinion, but may examine and determine what is the real substance and effect of the decision.

Suppose, for illustration, a State legislature should pass an Act exempting the property of a particular corporation for all taxation, and that a subsequent legislature should pass an Act subjecting that corporation to the taxes imposed by the city in which its property was located, and that, on the first presentation to the highest Court of the State of the question of the validity of taxes levied under and by virtue of this last Act, that Court should in terms hold these city taxes valid notwithstanding the general clause of exemption found in the prior statute. In that event no one would question that this Court had jurisdiction to review such judgment, and inquire as to the scope of the contract of exemption created by the first statute.

Suppose, further, that this Court should hold that the first statute was valid and broad enough to exempt from all taxation, city as well as State, and adjudge the last Act of the Legislature void as in conflict with the prior; and that thereafter the city should again attempt to levy taxes upon the corporation, and that upon a challenge of those taxes the State Court should say nothing in respect to the last Act, but simply rule that the original Act exempting the property of the corporation from taxation was void, could it fairly be held that this Court was without jurisdiction to review that judgment, a judgment which directly and necessarily operated to give force and effect to the last statute subjecting the property to city taxes? Could it be said that the silence of the State Court in its opinion changed the scope and effect of the decision? In other words, can it be that the mere language in which the State Court phrases its opinion takes from or adds to the jurisdiction of this Court to review its judgment? Such a construction would always place it in the power of a State Court to determine our jurisdiction. Such, certainly, has not been the understanding, and such, certainly, would seem to set at naught the purpose of the Federal Constitution to prevent a State from nullifying by its legislation a contract which it has made, or authorized to be made."

See authorities cited in said opinion:

From *Carondelet Canal Co. vs. Louisiana*, 233 U. S., 362, 377, we quote as follows:

"The repeal of a law which constitutes a contract is an impairment of its obligation. 'It may be laid down, as a general principle, that, whenever a law is in its own nature a contract, and absolute rights have vested under it, a repeal of that law can not divest those rights, or annihilate or impair the title so acquired.' 2 Story on the Constitution, Sec. 1391."

From a consideration of these authorities we believe the Court will find no difficulty in bringing the case within their provisions. Therefore, we will proceed to discuss the

VALIDITY OF ORDINANCE 1997

which evidences the contract between the parties litigant.

In order to do so we will quote from said ordinance a few paragraphs embodying the contract between the parties.

Ordinance 1997:

"An ordinance granting rights of way and depot and other rights and privileges to the Louisiana Railway and Navigation Company."

Sections 1 and 2 grant to the Louisiana Railway and Navigation Company a right of way into the City of New Orleans over and across various streets, giving the right to lay double tracks on some streets, single tracks on others, to connect its tracks at other places, and to lay as many tracks as it may desire on Poydras Ditch when filled. Then follows that portion of the ordinance relative to the grant of right of way over the Public Belt Railroad and reservation as follows:

"SEC. 3. *Be it further ordained, etc.*, That whereas, under Ordinance No. 1615, N. C. S., the New Orleans and San Francisco Railroad Company, its successors or assigns, have been granted the right to construct, ~~at their own cost and expense, the~~ double-track Belt Line over the Belt reservation on the river front, from the present end of the Public Belt, on the upper side of Audubon Park, to Henderson Street, and under said ordinance the company dedicates said tracks to perpetual public use; therefore, under the belt provisions of said Ordinance No. 1615, N. C. S., 'and with the limitations therein which recognize and preserve the

present and future rights of the City of New Orleans over the projected Public Belt Railroad,' the Louisiana Railway and Navigation Company is hereby granted a right of way over the double track Belt Line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson Street, upon the following terms and conditions:

(a) That, when said Louisiana Railway and Navigation Company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, the said company shall pay to the City of New Orleans the sum of fifty thousand dollars (\$50,000). * * * and when said company shall be ready to begin to operate its engines, trains and cars, as above provided, the said company shall deliver to the fiscal agent of the City of New Orleans bonds or other securities satisfactory to said fiscal agent of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said company with the foregoing obligation, and to be returned to said company when said company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, and shall have paid said sum of fifty thousand dollars to said fiscal agent. * * *

(b) That, in consideration of the payment of the above sum, the Louisiana Railway and Navigation Company shall have the right to operate its own locomotives, cars and equipment over said Public Belt from the upper city limits to Henderson Street. * * *

(c) That, in the event of the New Orleans and San Francisco Railroad Company, its successors or assigns, failing, without legal excuse, to build said Belt tracks from the upper side of Audubon Park to Henderson Street, on or before July 1, 1904, the Louisiana Railway and Navigation Company shall build the same from the upper side of Audubon Park to Henderson Street under the terms and conditions of Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.; and, in

case said Louisiana Railway and Navigation Company shall build said tracks, it is hereby granted the right and privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of said Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., said Louisiana Railway and Navigation Company assuming the obligation of the New Orleans and San Francisco Railroad Company under said paragraph of said ordinance, and being hereby granted all the rights and privileges of said New Orleans and San Francisco Railroad Company, its successors or assigns, under said Paragraph 10 of Section 2 of said ordinance, *except as hereinafter provided*, such construction of said tracks from the upper side of Audubon Park to Henderson Street to be in lieu of the payment of \$50,000 referred to in Paragraph (a) of this section; provided, that said Louisiana Railway and Navigation Company shall complete the said tracks to Henderson Street within one year from the time the city shall furnish the clear and undisputed right of way, it being always understood that said Louisiana Railway and Navigation Company assumes all the obligations of the New Orleans and San Francisco Railroad Company under Paragraph 10 of Section 2 of said Ordinance No. 1615, N. C. S.; *and provided that, as soon as said Belt tracks shall be completed to Henderson Street, the same shall be turned over to the immediate ownership of the City of New Orleans, and to be under the control and management of the Public Belt authority; * * **

(d) That, in the event the New Orleans and San Francisco Railroad Company, its successors and assigns, shall from any cause complete only a portion of the tracks from the upper side of Audubon Park to Henderson Street, the Louisiana Railway and Navigation Company, its successors and assigns, shall have the right to operate its own locomotives, cars and **equipment over such portion of the tracks** as is already built, and as may be built by the New Orleans and San Francisco Railroad Company, its successors and as-

signs, and for such privilege shall pay to the City of New Orleans such proportion of the sum provided in clause (a) of this paragraph as the tracks so constructed and used by said Louisiana Railway and Navigation Company bear to the whole length of the tracks from the upper city limits to Henderson Street."

As the validity of this contract must be determined by the common law of Louisiana, the Civil Code of that State, we will for the convenience of the Court before beginning the discussion of the point quote those articles of said code which, we assert, control the question:

"2021. *Conditional obligations* are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happen, it is a *suspensive* condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a *resolutive* condition.

2022. Conditions, whether suspensive or resolutive, are either casual, potestative or mixed.

2023. *The casual condition* is that which depends on chance, and is no way in the power either of the creditor or of the debtor.

2024. *The potestative condition* is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder.

2025. *A mixed condition* is one that depends at the same time on the will of one of the parties and on the will of a third person, or on the will of one of the parties, and also on a casual event.

2027. Whether the parties intended to create a condition or only to *modify* the obligation without making its existence depend on the event, must be determined, in doubtful cases, by applying the rules hereinbefore established for the interpretation of obligations.

2028. *The contract* of which the condition forms a part is, like all others, complete by the assent of the

parties; the obligee has a right of which the obligor can not deprive him; its exercise is only suspended, or may be defeated, according to the nature of the condition.

2034.—1174. Every obligation is null, that has been contracted, on a *potestative condition*, on the part of who binds himself.

2035. The last preceding article is limited to *potestative conditions* which make the obligation depend solely on the exercise of the obligor's will; but if the condition be, that the obligor shall do or not do a certain act, although the doing or not doing of the act depends on the will of the obligor, yet the obligation depending on such condition, is not void.

2037. Every condition must *be performed* in the manner that it is probable that the parties wished and intended that it should be.

2040. The condition is considered as fulfilled, when the fulfillment of it has been *prevented* by the party bound to perform it."

This article is construed in *De la Vergne Co. vs. N. O. & Western R. R. Co.*, 51 An., 1733, Syllabus No. 2:

"When one party offers to perform a condition precedent, and is prevented by the other, the offer will be treated as *performance*, and the conduct of the other party as excusing performance."

We will divide the discussion of this question upon which the State Court rests its decision into two sections or chapters and will give a synopsis of each at the beginning.

I.

First Contention of City Discussed—The Object of the Contract Considered—Purpose of City to Secure Belt Railroad—Had Already Built Two Miles—Had Arranged With Frisco for Five Miles More—Object of L. R. & N. to Connect Its Railroad With Deep Water and Have Extensive Terminals on River Front—Property Bought for That Purpose—Agreement of Company to Pay Fifty Thousand Dollars for the Use of All Tracks Built and to be Built to Henderson Street—Failure of the Frisco to Build—Company to Build in Lieu of Paying Fifty Thousand Dollars—Meeting of Minds Constituted a Commutative Contract—Contract Complete—City Made the Grant—Railroad Agreed to Pay the Consideration—Plaintiff Claims Conditions Precedent Exist—Analysis of the So-Called Conditions—Paragraphs a, b and c, Section 3, Analyzed—Reason for Using Expression “FAILING WITHOUT LEGAL EXCUSE to Build, etc., Before July 1, 1904”—Stipulation Purely in Interest of L. R. & N. and Could be Waived—Could Not be Taken Advantage of by City—The Alternative Consideration of Grant to Build Belt Tracks Could be Eliminated and Grant Not Affected.

The city contends that the conditions stipulated in the contract are suspensive; that the contract does not take effect until the happening or non-happening of the conditions therein stipulated, and, the same not having happened, the contract never took effect. This contention is leveled at Paragraph C of the contract and ordinance, which stipulates:

“That, in the event the New Orleans and San Francisco Railroad Company, its successors or assigns,

failing, without legal excuse, to build said Belt tracks from the upper side of Audubon Park to Henderson Street on or before July 1, 1904, the Louisiana Railway and Navigation Company shall build the same," etc.

Is this a suspensive condition to the right of way over the Belt tracks? This stipulation is the alternative consideration of the grant to the Louisiana Railway and Navigation Company. It is not a condition precedent, nor is it a suspensive condition. It is a condition with regard to the building of the tracks themselves. But it is in no manner a condition which affects the validity of the grant, unless the city itself were to take advantage thereof by a formal demand upon the defendant to build the tracks, and then, upon its failure, by a suit to dissolve the contract.

The use of the Belt tracks already built and to be built was the object about which the parties contracted. When they entered into this contract it was contemplated by both parties that the city would cause the tracks to be constructed down to Henderson Street, and the consideration was that the Louisiana Railway and Navigation Company should pay the sum of fifty thousand dollars for the use of the tracks. This appears in Paragraphs (a) and (b). Therefore, the obligation assumed by the Louisiana Railway and Navigation Company to build the tracks was only an alternative consideration of the contract, which it obligated itself to perform, and which it agreed to guarantee by the deposit of certain securities with the fiscal agency. It, therefore, could not be construed as a condition which dissolved the contract of right. Such conditions only exist in potestative contracts, or a contract dependent on a future and uncertain event, and not depending upon the will of either party to the contract.

Where one contracts for a certain object and agrees to perform certain services therefor, and agrees to guarantee

its performance by bond or by the deposit of securities, it is a commutative contract, complete in every detail, and it may be enforced judicially by either party.

"C. C. 1768. Commutative contracts are those in which what is done, given or promised by one party is considered as equivalent to, or a consideration for, what is done, given or promised by the other."

It is a well-settled principal of law that the dissolution of such contracts can only be had by suit after the parties have been regularly put in default.

"C. C. 2047. In all cases the dissolution of a contract may be demanded *by suit* or *by exception*; and when the resolutive condition is an event, not depending on the will of either party, the contract is dissolved of right; but, in other cases, it must be sued for, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition."

"The condition that, should a railroad *not* be completed within a stated time, the contract giving right of way shall be null and void, is resolutive in character." *Gayden vs. R. R. Co.*, 39 An., 269.

So, if the Court agrees that the obligation to build the Belt Railroad was the consideration of the contract to use the Belt tracks, the payment or performance of which the Louisiana Railway and Navigation Company agreed to guarantee by depositing securities, then we bring the case clearly within the rule of law above enunciated.

Before proceeding further with the discussion of this so-called condition, let us consider the motives of each party which led up to the formation of the contract. The city had for years been endeavoring to build or cause to be built a Belt Railroad on the river front. It contracted with the Illinois Central, which built two miles of said road. It

then agreed with the Frisco to allow it the use of the tracks in consideration of the cost of constructing about five miles more, and to require each and every railroad that used the tracks to pay an amount equal to the cost of the tracks down to Henderson Street, which fund should be used for the extension of the Belt.

The object of the Louisiana Railway and Navigation Company was to secure the use of the tracks so as to run **its own equipment** to certain property on the river front, where it proposed to erect railroad terminals and connect with certain steamship lines in aid of its railroad. So there was a meeting of the minds. The defendant desired to use the tracks to its river terminals (Tr., p. 148), the city was willing to grant that use for a consideration—first, a money consideration, and, in the event of the failure of the contractor with whom it had already dealt to build the road, then that the defendant should construct the same up to Henderson Street.

This being the object of each party, then why should they for a moment think of putting a condition in the contract which might defeat its very object and purposes? If the stipulation of the failure of the Frisco to build on or before July 1, 1904, without legal excuse, is subject to the construction contended for by plaintiff, then it virtually destroys the very object of the City of New Orleans in having a Belt Railroad built. For, if the ordinance of the Frisco is technically construed, your Honors will find that the Frisco did not obligate itself to build the railroad. It simply had the right to do so, and, if it failed, it might well be contended that it failed with a legal excuse. So this was evidently not the intention of the parties. With a view of determining what was their intention, and determining the exact scope of the ordinance and contract under consideration, let us analyze said ordinance.

Section 3 is the portion of the ordinance with which we have to deal. The first paragraph of that section simply declares (eliminating surplus verbiage) that the New Orleans and San Francisco Railroad Company, its successors or assigns, will build, or has the right to build, for the City of New Orleans, a Public Belt Railroad "from the present end of the Public Belt on the upper side of Audubon Park to Henderson Street." It then provides that

"the Louisiana Railway and Navigation Company is hereby granted a right of way over the double-track Belt Line and reservation on the river front of the City of New Orleans from the upper limits of the City of New Orleans to Henderson Street." * * *

If this concluded the ordinance, the grant would be complete, since it was accepted and acted upon by the railroad company. It would be a mere offer that could be revoked up to the time that it was accepted or acted upon. But the ordinance does not contemplate the giving away of this franchise or right. It goes on further to declare that the right is granted upon the "following terms and conditions." Then the question arises: What are these conditions? Are they protestative conditions, the failure of which dissolves the contract of right, or are they the ordinary resolutive conditions that are inherent in every commutative contract? Let us analyze these conditions and answer this question.

The first so-called condition we find in Section 3, paragraph (a). That section clearly contemplates the use of the double-track Belt Line that is already constructed and to be constructed by some other agent than the defendant. It provides that, when the defendant company has operated its trains over the Public Belt Railroad for thirty days, it shall pay to the said City of New Orleans fifty thousand dol-

lars. In order to guarantee this payment it binds itself to deposit with the fiscal agent of the City of New Orleans, before it begins to operate over said tracks, bonds or approved securities to that amount, with the stipulation that same shall be returned when the consideration of fifty thousand dollars has been paid.

What is the object of requiring the payment of this fifty thousand dollars? It is the consideration of the right to use the tracks. Paragraph (a) is susceptible of such construction, but, for fear that there might be some controversy about the same, paragraph (b) provides in express terms:

"That, in consideration of the payment of the above sum (\$50,000), the Louisiana Railway and Navigation Company shall have the right to operate its own locomotives, cars and equipment over said Public Belt from the upper city limits to Henderson Street." * * *

So the consideration that the defendant company was to pay the city for the use of the Belt tracks was fixed at fifty thousand dollars.

This contract is governed by the same rules as that of sale, and it is no more subject to the dissolving condition than is a contract of sale. If the city desired to be relieved of the contract, it would have, first, to demand a performance, on the part of the Louisiana Railway and Navigation Company, to deposit the fifty thousand dollars in securities or pay the fifty thousand dollars in money, and, upon its failure to do so, to institute suit to dissolve the contract or to recover the fifty thousand dollars. If this was the only condition of the contract, it is easy of solution. So the question presents itself: What effect does the further condition, or, we might say, the alternative consideration, of the contract have upon the same? It is found in paragraph (c) of Section 3, and is the stipulation on which the plaintiff seems

to rely with great assurance as being a suspensive condition, and one which has dissolved the contract of right. Let us analyze this paragraph (c).

It provides that, in the event that the New Orleans and San Francisco Railroad Company shall fail to build the Belt, as provided for in paragraph 10, Section 2, of the Frisco ordinance, then that the Louisiana Railway and Navigation Company shall do so in its stead. This is what plaintiff in error contends is the alternative consideration, the Louisiana Railway and Navigation Company is to pay for its right of way over the Public Belt Railroad and reservation. If there was no other verbiage to enshroud this alternative consideration, then it would be easy of solution. But it provides:

"That, in the event the New Orleans and San Francisco Railroad Company, its successors or assigns, *failing, without legal excuse*, to build said Belt tracks before July 1, 1904, the Louisiana Railway and Navigation Company shall build the same," etc.

What do we understand by the expression, "*failing without legal excuse*"? And what was the object of writing same in the contract? There is certainly no legal reason that would prompt the legal mind in inserting such a stipulation, but we see a reason that might appeal to the layman.

The Louisiana Railway and Navigation Company had agreed to build this railroad as a consideration for the use of the tracks. It had not only bound itself to do so, but had agreed to deposit fifty thousand dollars in securities to guarantee the performance. Therefore, the Louisiana Railway and Navigation Company did not want to bind itself to build the railroad when it might not be able to do so on account of some legal reason that might exist. It likely thought that the Frisco was acting in good faith, and would

carry out the contract unless it was prevented by some legal or valid reason; and, if such legal or valid reason did exist that prevented the Frisco from performing the contract, then the same reason might prevent plaintiff in error from building the road. So, in order to protect itself from such a contingency, and to hold its grant intact based upon the first consideration—to wit, the payment of the fifty thousand dollars—this condition was embodied in the ordinance for the sole protection and benefit of the Louisiana Railway and Navigation Company. Construed in this light, it is easy of analysis.

The city says to the Louisiana Railway and Navigation Company: "I have granted you a right of way over my Belt Railroad; you have agreed to pay me fifty thousand dollars for the use of it. It may be that my contractor will not build the railroad to Henderson Street, and, in that event, I shall require you to build it as a consideration for the use of same and in lieu of the payment of the fifty thousand dollars."

The Louisiana Railway and Navigation Company says: "I will do so, but perhaps your agent or contractor will have a valid excuse for not building, and I may not be able to build for the same reason."

The city replies: "In that event I will relieve you of the obligation to build. If there is a valid reason why the Frisco can not build, then I will not impose the condition of building upon you. It will be left at your option."

We submit that this stipulation is susceptible of this construction, and it is the only fair construction that can be placed upon it.

Instead of the Frisco's failure to build without legal excuse being a condition which annuls the grant to the Louisiana Railway and Navigation Company of the right to use the Belt tracks, it is a condition stipulated in favor of the de-

fendant. If it had actually happened, and if taken advantage of by the defendant, it would relieve it (the defendant) of the obligation to build the road, but would in no manner impair its right to use the road already constructed or that may be constructed either by the Frisco, by the city or its agent.

Suppose, for the sake of argument, that this second condition had not been written; that the Louisiana Railway and Navigation Company had not been required to build; that the parties had relied implicitly on the Frisco building, and the only condition of the grant to the Louisiana Railway and Navigation Company was the payment of the fifty thousand dollars, as provided in paragraph (a). Suppose, under these circumstances and under these conditions, the Frisco had failed to build, just as it has done. Would it be contended that the failure of the Frisco to build prevented the Louisiana Railway and Navigation Company from exercising the right of way over the tracks, for which it was to pay fifty thousand dollars? Under such a contingency, what would naturally be the course pursued by the Louisiana Railway and Navigation Company? It would demand of the city that the Belt be completed to Henderson Street. If the city failed to do so, the Louisiana Railway and Navigation Company, having been granted the right to use the tracks already built and the right of way over the Belt reservation where there were no tracks, would have been authorized to construct them itself upon the city refusing to do so. It would have been further authorized to use the fifty thousand dollars, which it had agreed to pay as the consideration of the use of the tracks, in constructing the same.

This contract becomes much simpler of construction if we leave out the New Orleans and San Francisco Railroad Company entirely, for it is only an agent of the city in constructing the Belt Railroad, and treat it as though any rail-

road contractor had contracted to build the Belt and his name not stated.

So let us presume a contract written in this manner. Then Section 3 would provide that the City of New Orleans has caused to be constructed Belt tracks of about two miles in length; that it has contracted to have these tracks extended to Henderson Street; that it grant the Louisiana Railway and Navigation Company the right of way over the tracks and reservation to Henderson Street on the following conditions:

(b) That it will pay fifty thousand dollars as a consideration of this grant, and will deposit securities to guarantee the payment of same.

(c) That, in the event the contractor fails to build the road, as contemplated in the first part of Section 3, without legal excuse for so failing, the Louisiana Railway and Navigation Company shall build it. In which event it will not be required to pay fifty thousand dollars, as provided in paragraph (a), but the cost of the construction shall be the consideration of the grant. The Louisiana Railway and Navigation Company agrees to build under this contingency, and binds itself to deposit fifty thousand dollars to guarantee performance.

The original contractor defaults. When the time limit in which it had to build the road expired the Louisiana Railway and Navigation Company comes forward and says: "I am ready to build." The city says: "No; we will not permit you to build because the contractor had a legal excuse for not building, and you were only required to build if the original contractor failed without legal excuse." But the Louisiana Railway and Navigation Company says: "I deny, first, that the contractor had a legal excuse for failing to build; second, if he did have such excuse, the condition that I was required to build only if he failed without legal ex-

cuse was a stipulation in my favor, and I waive the same. In other words, you said to me: 'If my agent fails to build, you shall build; but, if my agent has a legal excuse for not building, then I will not hold you to the performance of this alternative consideration of the contract.' " In reply to this the Louisiana Railway and Navigation Company states: "This stipulation is solely in my interest. I, thinking that, if the original contractor faced an obstacle which gave him a legal excuse, the same excuse might apply to me; that I might not be able to perform on account of same, and, therefore, it was agreed that I might take advantage of such a contingency and be relieved of this alternative consideration of the contract. I now inform you that I do not desire to take advantage of this stipulation, and will build the Belt without regard to whether your agent failed with or without a legal excuse. I waive that stipulation."

Is there any rule of law or equity that would authorize the city to refuse the proffered offer to perform the consideration of the contract, and then declare that the grant had been forfeited for the reason that the consideration of the same had not been performed?

This contract being one with reciprocal obligations, the plaintiff in error having agreed to perform the consideration—that is, build the Belt—and having agreed to deposit, and having actually deposited, fifty thousand dollars in securities to guarantee that it would perform the consideration, it becomes a contract enforceable in a court of justice by either party. Therefore, suppose that the city proceeded regularly to enforce the performance of the contract. It first put the defendant regularly in default by demanding that it comply with its contract and construct the Belt as per the agreement, and, upon its failure to do so, then instituted suit either for a specific performance or the recovery of the deposit of fifty thousand dollars.

In reply to this suit the Louisiana Railway and Navigation Company answered that, while it agreed to build the Belt as the alternative consideration of its right of way on the Belt tracks, there was a stipulation in the contract to the effect that it would only be required to build upon the failure of the Frisco to build without legal excuse; that the Frisco had a legal excuse for failing to build, and, therefore, it is relieved of this alternative consideration of building in lieu of paying the fifty thousand dollars provided for in paragraph (a) of the contract.

The case is heard upon these issues, and the Court decides that the Frisco had a legal excuse for not building, and that the Louisiana Railway and Navigation Company is not required to build if the Frisco had a legal excuse, and it is, therefore, relieved of the alternative consideration of building the Belt. Would this decree and judgment in the least affect the validity of the grant and the consideration therein—to wit, the payment of the \$50,000 as the consideration therefor? Would not the Court hold that the second consideration was as though it had not been written? And the defendant, having taken advantage of the stipulation in its favor, was relieved of performing that particular consideration? But that the contract itself was valid and rested upon the first, which was a sufficient consideration?

II.

DIVISIBILITY OF GRANT.

Contention of City Could Be Conceded, and Still Defendant Would Have Right to Build Part of Belt—Manner in Which City Was to Build Belt Shows Divisibility of Contract—To Reach Wharves by Belt Object of City—By Completing Part of the Belt Some of the Wharves Could Be Reached—Ordinances 1516 and 1997 Susceptible of This Construction.

The plaintiff in error could concede city's contention which has been discussed in the foregoing chapter, and still the alternative consideration of building the Belt, or at least a portion thereof, would not be impaired, for the reason that the Frisco did fail to build at least all that portion of the Belt for which the city had a clear right of way, say, down to Toledano Street, without legal excuse. If this be true, then the obligation to build on the part of the defendant falls clearly within the provision of the Frisco's failing to build without legal excuse. So let us determine whether or not the defendant was obligated to build a part of the Belt in the event that there was some legal reason why the entire Belt could not be constructed.

The city was desirous of having the Belt constructed. It had contracted with the Illinois Central to build a part of the Belt, but that part not reaching any of the wharves could not be used. It then authorized the Frisco to build another portion of the Belt down to Henderson Street. In the same ordinance in which the Frisco was authorized to build we find that the city expected to build the Belt later on to Clouet Street, and afterwards complete the entire Belt. So the very manner in which the city had built, and was endeavoring to build, shows that it expected to have constructed any portion

of the Belt that could be built at that time. This same idea prevails in the ordinance itself.

Paragraph (d) of Section 3 provides:

"That, in the event the New Orleans and San Francisco Railroad Company, its successors or assigns, shall, from any cause, complete only a portion of the tracks from the upper side of Audubon Park to Henderson Street, the Louisiana Railway and Navigation Company, its successors, assigns, etc., shall have the right to operate its own locomotives, cars and equipment over such portions of the tracks as are already built and as may be built by the New Orleans and San Francisco Railroad Company, its successors and assigns, and for such privilege shall pay to the City of New Orleans such portion of the sum provided for in clause (a) of this paragraph as the tracks so constructed and used by the said Louisiana Railway and Navigation Company bear to the whole length of the track from the upper city limits to Henderson Street."

There can be no misconception of this paragraph. It clearly contemplates that the Frisco, or its successors or assigns, might not be able to complete the Belt to Henderson Street. One of the contingencies was the furnishing of a right of way. The city might not have been able to furnish a clear right of way for the building of the Belt to Henderson Street—in fact, it was not able to do so, for it was prevented from using the property under the control of the Port Commission by judgment of the Supreme Court in the suit of the *Port Commission vs. The New Orleans and San Francisco Railroad Company and the City of New Orleans*.

So, if the Frisco had the right to build a portion of the track, and was only prevented from building the entire track because the city failed to furnish a right of way, then the Louisiana Railway and Navigation Company, succeeding

to the rights of the Frisco, under Paragraph 10, Section 2, of Ordinance No. 1516, would be entitled to also construct a portion of the Belt. So the failure of the Frisco to build a portion of the Belt was not due to a legal excuse, but was a failure to build without a legal excuse.

The intention of the parties evidencing that this contract was intended to be divisible is further indicated by the language used in the latter part of Paragraph (c), Section 3, Ordinance 1997, with reference to the deposit of the \$50,000 in securities,

“that, in case said company [the Louisiana Railway and Navigation Company] shall be prevented from building said Belt tracks, or any portion of the same, on account of the city not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by the said fiscal agent.”

Note the language: “That, in case said company [Louisiana Railway and Navigation Company] shall be prevented from building said Belt tracks, or *any portion of same*, the securities shall be returned,” etc.

Now, this clearly shows that, in contemplation of parties, the Louisiana Railway and Navigation Company might begin to build the racks from the end of the present Belt track towards Henderson Street, and, after having gone a certain distance, some insurmountable obstacle with reference to the acquisition of a right of way might have presented itself, and the construction work would have had to cease at that point. Then, under the terms of this ordinance, the contract on the part of the Louisiana Railway and Navigation Company would have been fulfilled, and it would have been authorized to retake the \$50,000 in securities deposited to guarantee the performance of the entire contract, al-

though the Belt had not been completed to Henderson Street. So the provision was made that the securities should be returned if it was prevented from "building said Belt tracks, or any part of same." If it was prevented from building the entire Belt on account of the city failing to furnish the right of way, the \$50,000 was to be returned, and, if it failed to build a part of the Belt, its obligation was fulfilled, and the \$50,000 in securities should in that event be also returned. This clause seems to be conclusive that it was the intention of the parties that the Louisiana Railway and Navigation Company should build such portion of the Belt for which the city furnished a right of way down to Henderson Street. Then, if the city, under the Dock-Board decision, could not furnish a right of way over property under control of the Port Commission, it must, nevertheless, in good faith, permit the defendant to perform the consideration of its grant by building the road over that territory over which the city did own the right of way.

The Honorable Supreme Court, in the case of *Capdevielle, Mayor, vs. New Orleans and San Francisco Railroad Company*, 110 La., 904, had in mind this very idea when it used in said decision the following language:

"The city has not bound itself hard and fast, for a stated consideration, to furnish this right of way. She transferred the right she was authorized to transfer—that is, the right she owns and controls. If she did not have the authority, she did not transfer the right. As between the city and defendant she is bound, in good faith, to carry out the terms of the ordinance."

We here say to the Court, that while this case was pending on rehearing plaintiff in error filed with the Court an application to know if the city had the right to grant a right of way on part of the Belt, which question was answered in the affirmative. (See the opinion on rehearing.)

In this same connection we will state that it is specially provided in this contract that, if the city failed to furnish the entire right of way to Henderson Street, then the Louisiana Railway and Navigation Company would only be required to build that portion of the Belt to which it could furnish a right of way. Its obligation would then be fulfilled, and the deposit of \$50,000 in securities would be returned. So we must conclude that, in contemplation of the contract, if the Louisiana Railway and Navigation Company was required to perform the second consideration for its use of the Belt tracks, it was to only perform it insofar as the city furnished a right of way, and its right to use the tracks under this contingency was only up to the extent that it was authorized to build.

III.

The Frisco was prevented by injunction from building the road to Henderson Street, for the reason it would have run over property under control of the Dock Board from Toledano Street to Louisa Street. The Dock Board had given this right of way on condition that it should "*remain in force only so long as the Public Belt Railroad is operated and controlled by a Public Commission.*" * * * (Tr., p. 285.)

The city had given the Frisco under its ordinance control of the operation of the Belt in the following language:

Par. "J," Ordinance No. 1615, Tr., p. 247:

"That the movement of trains, cars and traffic on and over said tracks from the upper limits of the city to Henderson Street until the city completes her belt system to Clouet Street and begins to operate them as part of said system, shall be under the direction, control and management of said company * * *.

If, however, the Belt is not completed to Clouet

Street by July 1, 1907, the sole control and management of said Belt tracks shall revert to the Public Belt authorities of the City of New Orleans, July 1, 1907."

It was this clause in the ordinance that caused the Court to maintain the injunction against the construction by the Frisco of the road on that part of the right of way under the control of the Dock Board (*Board of Com'rs vs. New Orleans*, 112 La., 1011). This suit being pending at the time the Ordinance No. 1997 was passed in favor of your plaintiff in error, the following clause was inserted in said ordinance to meet the objection of the Dock Board:

"That as soon as said belt tracks shall be completed to Henderson Street the same shall be turned over to the immediate ownership of the City of New Orleans and be under the control and management of the Public Belt authority. * * *" (Tr., p. 261.)

So in determining the question as to whether or not the contract of plaintiff in error was a valid contract under the clause by which it succeeded to all the rights and obligations of the Frisco "except as otherwise provided," the proviso above quoted must be considered as written in lieu of the objectionable clause in the Frisco ordinance.

If we are right in this contention, then the only reason why the plaintiff in error can not exercise its right of way over the Public Belt tracks is because of the passage of Ordinance No. 2683 and the resolution of the Dock Board approving the same, from which ordinance we quote Section 3:

"That there shall be and there is hereby irrevocably dedicated to the people of New Orleans, for perpetual and *exclusive* use, as the location for a double track public belt railway, * * *" (Tr., p. 273). This ordinance repealed all laws in conflict.

The approval of the Dock Board reads:

"That the approval of this Board shall remain in force only as long as the Public Belt Railroad is *exclusively operated, managed and controlled* by the Public Belt Railroad Commission and that no rights or privileges are granted to any railroad company to control, manage and operate on said tracks, * * *"
(Tr., p. 286.)

This clearly brings to the Court's mind the difference in the prior and subsequent ordinance and their approval by the Dock Board.

WHEREFORE, your plaintiff in error respectfully submits, that the jurisdiction of your Honorable Court should be maintained and the motion to dismiss should be overruled, and that there should be further judgment reversing the judgment of the Supreme Court of Louisiana and decreeing that the contract entered into between the City of New Orleans and plaintiff in error as evidenced by Ordinance No. 1997 and the notarial acceptance of same, is a valid contract still existing between the parties, and that same should be enforced, for all of which it accordingly prays.

Respectfully submitted,

FOSTER, MILLING, BRIAN & SAAL,

WISE, RANDOLPH & RANDALL,

Attorneys for Plaintiff in Error.

M. J. FOSTER,

R. E. MILLING.

Explanatory: At the last term of your Honorable Court we filed a short brief in opposition to the motion to dismiss and attached thereto a copy of the brief which we filed on application for rehearing in the Supreme Court of Louisi-

ana. For the convenience of the Court, we bind that brief with the one herein submitted and especialy call the Court's attention to the brief on application for rehearing as that brief takes up and discusses every phase of the opinion and decree rendered by the said cause.

Respectfully,

R. E. MILLING,

Attorney for Plaintiff in Error.

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LOUISIANA RAILWAY & NAVIGATION COMPANY
v. BEHRMAN, MAYOR OF THE CITY OF NEW
ORLEANS.

ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 49. Argued November 4, 5, 1914.—Decided November 30, 1914.

While the jurisdiction of this court under § 237, Judicial Code, may not attach where the state court gave no effect to the state enactment claimed to have impaired the obligation of a contract, where the State does give effect to later legislation which does impair the obligation of a contract, if one exists, this court has jurisdiction to, and must, determine for itself whether there is an existing contract, even though the state court may have put its decision upon the ground

that the contract was not made, was invalid, or had become inoperative.

In determining whether effect has been given to later legislation, this court is not limited to mere consideration of the language of the opinion of the state court.

This court has jurisdiction under § 237, Judicial Code, to determine whether there is a contractual obligation which plaintiff in error is entitled to enforce without its being impaired by the operation of subsequent legislation enacted by or under the authority of the State. While courts should give them a fair and reasonable interpretation, public grants are not to be extended by implication beyond their clear intent.

As the ordinance on which the contract claimed to have been impaired was based, was intended to confer rights exclusively with reference to an existing plan of construction, and as that plan proved abortive because of legal obstacles to its fulfillment, no rights were conferred thereby, and a later ordinance on the same subject cannot be deemed invalid under the impairment of obligation clause of the Federal Constitution.

An ordinance of the City of New Orleans regarding construction of the Belt Railroad, held not unconstitutional because it impaired the obligation of a contract based on a former ordinance, as such contract was subject to a suspensive condition, and the event in which the obligation was to arise had not happened.

127 Louisiana, 775, affirmed.

THE facts, which involve the jurisdiction of this court under § 237, Judicial Code, and also the constitutionality under the impairment of obligation provision of the Federal Constitution of an ordinance of the City of New Orleans relating to the construction and operation of a belt railroad within the city, are stated in the opinion.

Mr. R. E. Milling, with whom *Mr. M. J. Foster* was on the brief, for plaintiff in error.

Mr. I. D. Moore for defendant in error.

MR. JUSTICE HUGHES delivered the opinion of the court.

The plaintiff in error seeks to review the judgment of the state court upon the ground that it denied a Federal right

asserted under the contract clause of the Constitution. Art. 1, § 10.

The suit was brought by the Mayor of the City of New Orleans, in his official capacity, to restrain the Louisiana Railway & Navigation Company from proceeding under a municipal ordinance—No. 1997, New Council Series, dated September 4, 1903—to construct and operate tracks over a public belt railroad reservation, and from operating cars, etc., over public belt railroad tracks, and to have the ordinance, so far as it granted to that Company such privileges of construction and operation, declared null and void. The facts, so far as it is necessary to state them, are these:

The authorities of the City of New Orleans devised the plan of establishing a public belt railroad along the river front. On March 1, 1899, the City adopted an ordinance (No. 15,080, C. S.) under which, in consideration of certain concessions, the Illinois Central Railroad Company built about two miles of the projected system, that is, from the upper limit of the City to the upper boundary of Audubon Park. This was followed by ordinance No. 147, N. C. S., adopted August 7, 1900, which created a Belt Railroad Board, composed of the Mayor and certain city officials, to construct, control and operate the belt railroad for the benefit of the City; and on August 12, 1902, the Board of Commissioners of the Port of New Orleans, called the 'Dock Board,'—a body exercising state authority over a part of the area to be traversed by the proposed road—approved the dedication for the purpose stated. This approval was to remain in force only so long as the belt railroad was 'operated and controlled by a public commission' in accordance with the provisions of ordinance No. 147.

On February 10, 1903, a further ordinance was adopted—No. 1615, N. C. S.—which, among other things, granted to the New Orleans & San Francisco Railroad Company

a right of way over the belt line and reservation from the upper limit of the City to Henderson Street. The condition was that the company, at its own expense, should construct and dedicate to perpetual public use the tracks as projected from the end of the line already built, on the upper side of Audubon Park, to Henderson Street (a distance of about five miles), the construction to be completed before July 1, 1904. Other provisions looked to still further construction through contributions from other railroads. The validity of this ordinance was at once challenged in a suit brought by the Mayor, on behalf of the City, which resulted in favor of the Railroad Company. *Capdevielle, Mayor, v. New Orleans R. R. Co.*, 110 Louisiana, 904. The terms of the ordinance, however, did not conform to the conditions upon which the Dock Board had consented to the building of the belt road, and, in a suit brought by that Board against the Railroad Company, the carrying out of ordinance No. 1615 was restrained so far as it authorized the construction of the railroad upon the property subject to the Board's jurisdiction. *Board of Commissioners v. New Orleans & San Francisco R. R. Co.*, 112 Louisiana, 1011. Following this decision, it appears that the New Orleans & San Francisco Railroad Company abandoned the building of the belt line contemplated by the ordinance; no part of it was constructed thereunder.

On September 4, 1903, while the suit of the Dock Board was pending, and after the final decision in the *Capdevielle* suit, the City adopted ordinance No. 1997, N. C. S.,—the ordinance here in question (127 Louisiana, pp. 784-792). Without passing now upon points in controversy, it may be said that this ordinance, reciting that under ordinance No. 1615 there had already been granted to the New Orleans & San Francisco Railroad Company the right to construct the belt line over the reservation from the place at which the rails then terminated to Henderson Street,

granted to the Louisiana Railway & Navigation Company—the plaintiff in error—a right of way over ‘the double track belt line and reservation’ to that point, upon stated terms and conditions, among which may be noted the following: That when the plaintiff in error had operated its equipment over the described belt tracks for thirty days, it should pay to the City the sum of \$50,000; that in case the New Orleans & San Francisco Railroad Company failed ‘without legal excuse’ to build the described line to Henderson Street, as provided in ordinance No. 1615, the plaintiff in error should build that line in place of the first-mentioned company—this construction to be in lieu of the payment of \$50,000 and the belt tracks so built, as soon as completed to Henderson Street, to be ‘turned over to the immediate ownership of the City of New Orleans’ and to be under ‘the control and management of the Public Belt authority’; and, further, that in case the New Orleans & San Francisco Railroad Company should from any cause complete only a portion of the described tracks, the plaintiff in error should have the right to use so much of the described belt line as had been built, on payment of a proportionate part of the specified sum. This ordinance the plaintiff in error formally accepted on September 17, 1903.

The suit brought by the Dock Board against the New Orleans & San Francisco Railroad Company was decided by the Supreme Court of the State in May, 1904, and, in the October following, the City adopted ordinance No. 2683, N. C. S., which made comprehensive provision for municipal construction and operation of the belt line system. All conflicting ordinances were repealed, and it cannot be doubted that this ordinance, if enforced, would make it impossible for the plaintiff in error to exercise the rights it might otherwise have under ordinance No. 1997. The belt board was reorganized by the establishment of a new Public Belt Railroad Commission, com-

posed of the Mayor and sixteen 'citizen tax payers,' to whom was confided the necessary administrative authority for carrying out the municipal scheme. This ordinance received the approval of the Dock Board on stated conditions, and, on July 1, 1905, the new undertaking was formally inaugurated. On November 10, 1905, the plaintiff in error deposited with a trust company, which was one of the fiscal agents of the City, \$50,000 in securities in alleged compliance with its contract under ordinance No. 1997. The City, however, went on with its own plan, arranging for bank credits to enable it to carry on the work under ordinance No. 2683, and when, in May, 1906, the plaintiff in error attempted to begin construction under the earlier ordinance it was stopped by the City authorities. Soon after, the present suit was instituted.

The petition of the Mayor, alleging upon various grounds the invalidity of ordinance No. 1997, also averred the adoption of ordinance No. 2683, the irrevocable dedication thereby for the reservation of the public belt railroad, and the undertaking by the City under that ordinance of the work of construction. The plaintiff in error, in its answer, set up the unconstitutionality of the later ordinance as one impairing contractual obligations. At the beginning of the suit a preliminary injunction was granted, in accordance with the City's prayer, and the City proceeded with the construction of the public belt railroad, which has since been put in operation. In the court of first instance, judgment went 'in favor of the plaintiff, Martin Behrman, in his official capacity of Mayor of the City of New Orleans, and as ex-officio president of the Public Belt Railroad Commission of the City,' declaring ordinance No. 1997, so far as it purported to grant the privileges in dispute, to be 'illegal, void and of no effect' and making the injunction permanent. This judgment was affirmed by the Supreme Court of the State upon the ground that the contract was 'subject to a suspensive

condition, and that this condition had become impossible of realization, and the contract had, in consequence, fallen through, when plaintiff made its attempt to begin work and the injunction was taken.' 127 Louisiana, 775, 795, 796.

The defendant in error moves to dismiss, invoking the established rule that, where the state court gives no effect to the subsequent enactment, the jurisdiction of this court does not attach. *Knox v. Exchange Bank*, 12 Wall. 379, 383; *Lehigh Water Co. v. Easton*, 121 U. S. 388, 392; *New Orleans Water Works v. Louisiana Sugar Co.*, 125 U. S. 18, 38, 39; *Central Land Co. v. Laidley*, 159 U. S. 103, 111; *Bacon v. Texas*, 163 U. S. 207, 216, 219; *Fisher v. New Orleans*, 218 U. S. 438, 440; *Missouri & Kansas Interurban Rwy. v. Olathe*, 222 U. S. 187, 190; *Cross Lake Club v. Louisiana*, 224 U. S. 632, 639. We are of the opinion that the present case is not within this rule. It is equally well settled that, where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee. *Jefferson Branch Bank v. Skelly*, 1 Black, 436, 442, 443; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116, 144, 145; *University v. People*, 99 U. S. 309, 321; *Mobile & Ohio Railroad v. Tennessee*, 153 U. S. 486, 492; *Douglas v. Kentucky*, 168 U. S. 488, 502; *Atlantic Coast Line v. Goldsboro*, 232 U. S. 548, 556; *Russell v. Sebastian*, 233

235 U. S.

Opinion of the Court.

U. S. 195, 202. And, in determining whether effect has been given to the later statute, this court is not limited to the mere consideration of the language of the opinion of the state court. *McCullough v. Virginia*, 172 U. S. 102, 116; *Houston & Texas Central Railroad v. Texas*, 177 U. S. 66, 76, 77; *Hubert v. New Orleans*, 215 U. S. 170, 175; *Carondelet Canal Co. v. Louisiana*, 233 U. S. 362, 376. In the present case, it is apparent that the whole object of the suit was to establish the right of the City to carry out the subsequent ordinance, which conflicted with and repealed the earlier ordinance so far as it might be construed to give to the plaintiff in error the particular privileges therein described. It was, as appears from the petition itself, to accomplish the purpose of the later enactment, and the building of the belt line thereunder, that the City asked the aid of the court's injunction in this suit; and it was through this protection that the municipal scheme of construction under the later ordinance was actually carried out. The final judgment completed and made permanent this protection, with respect to operation as well as construction, as against the claim of contract right. It must follow that this court has jurisdiction to determine whether that claim is well-founded, that is, whether there is a contractual obligation which the plaintiff in error is entitled to enforce without its being impaired by the operation of the subsequent provision having, by virtue of state authority, the force of state law.

It is the contention of the plaintiff in error that although the proposed belt road to Henderson Street was not built by the New Orleans & San Francisco Railroad Company, and although it be assumed that the failure of that company to build was legally excusable and hence that the obligation of the plaintiff in error to build in its stead did not arise, still there was an effective grant under ordinance No. 1997 and the plaintiff in error is entitled to

the use of the belt in the manner therein described upon the payment of \$50,000.

We agree with the state court that this is not a proper interpretation of the ordinance.¹ Provision had already

¹ "This ordinance, so far as it is material with respect to this question, is as follows:

"SECTION 3. Be it further ordained, etc., That, whereas, under Ordinance No. 1615, N. C. S., the New Orleans & San Francisco Railroad Company, its successors or assigns, have been granted the right to construct, at their own cost and expense, the double track Belt line over the Belt reservation on the river front, from the present end of the Public Belt on the upper side of Audubon Park to Henderson Street, and under said ordinance the Company dedicates said tracks to perpetual public use, therefore, under the belt provisions of said Ordinance No. 1615, N. C. S., 'and with the limitations therein which recognize and preserve the present and future rights of the City of New Orleans over the projected Public Belt Railroad,' the Louisiana Railway & Navigation Company is hereby granted a right of way over the double track Belt line and reservation on the river front of the City of New Orleans, from the upper limits of the City of New Orleans to Henderson Street, upon the following terms and conditions:

"(a) That, when said Louisiana Railway & Navigation Company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, the said Company shall pay to the City of New Orleans the sum of Fifty Thousand Dollars (\$50,000), . . . and when said Company shall be ready to begin to operate its engines, trains and cars as above provided, the said Company shall deliver to the Fiscal Agent of the City of New Orleans, bonds or other securities, satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said Company with the foregoing obligation, and to be returned to said Company when said Company shall have operated its engines, trains and cars over said Belt tracks, as provided in this ordinance, for a period of thirty days, and shall have paid said sum of fifty thousand dollars to said Fiscal Agent. . . .

"(b) That in consideration of the payment of the above sum, the Louisiana Railway & Navigation Company shall have the right to operate its own locomotives, cars and equipment over the said Public Belt from the upper city limits to Henderson Street. . . .

"(c) That in the event of the New Orleans & San Francisco Railroad Company, its successors or assigns, failing, without legal excuse, to

been made for construction to the designated point by the New Orleans & San Francisco Railroad Company. Ordinance No. 1997 prefaced its grant by a recital of the right of construction which had been given to that com-

build said Belt tracks from the upper side of Audubon Park to Henderson Street, on or before July 1, 1904, the Louisiana Railway & Navigation Company shall build the same from the upper side of Audubon Park to Henderson Street, under the terms and conditions of Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S.; and, in case said Louisiana Railway & Navigation Company shall build said tracks, it is hereby granted the right and privilege to operate its trains, cars and traffic over said tracks under all the provisions and terms of said Paragraph 10 of Section 2 of Ordinance No. 1615, N. C. S., said Louisiana Railway & Navigation Company assuming the obligation of the New Orleans & San Francisco Railroad Company under said paragraph of said ordinance, and being hereby granted all the rights and privileges of said New Orleans & San Francisco Railroad Company, its successors or assigns, under said Paragraph 10 of Section 2 of said Ordinance, except as hereinafter provided, such construction of said tracks from the upper side of Audubon Park to Henderson Street to be in lieu of the payment of \$50,000, referred to in Paragraph (a) of this section; provided, that said Louisiana Railway & Navigation Company shall complete the said tracks to Henderson Street within one year from the time the City shall furnish the clear and undisputed right of way, it being always understood that said Louisiana Railway & Navigation Company assumes all the obligations of the New Orleans & San Francisco Railroad Company under Paragraph 10 of Section 2 of said Ordinance No. 1615, N. C. S.; and provided that, as soon as said Belt tracks shall be completed to Henderson Street, the same shall be turned over to the immediate ownership of the City of New Orleans and to be under the control and management of the Public Belt authority; and provided, further, that said Louisiana Railway & Navigation Company shall, on July 1, 1904, deposit with the Fiscal Agent of the City of New Orleans, bonds or other securities satisfactory to said Fiscal Agent, of the value of fifty thousand dollars, the same to be held in escrow as security for compliance by said Company with the foregoing obligation and to be returned to said Company when said Company shall have built and completed said Belt tracks from the upper side of Audubon Park to Henderson Street; and provided, further, that in case said Company shall be prevented from building said Belt tracks, or any portion of the same, on account of the City

pany and it was expressly stated that the grant to the plaintiff in error was made 'under the belt provisions of said ordinance No. 1615.' It had been provided in the last-mentioned ordinance that the public authorities might give to other railroad companies the right to use the road thus to be constructed, on their making contributions which should go into a special fund for the further extension of the belt line system. It is manifest that the intent was to give to the plaintiff in error the described right to use the tracks thus to be laid. But it was also contem-

not furnishing the right of way under the terms of Ordinance No. 1615, N. C. S., or by causes beyond its control, then the securities deposited shall be returned to it by said Fiscal Agent. . . .

"(d) That in the event the New Orleans & San Francisco Railroad Company, its successors and assigns, shall, from any cause, complete only a portion of the tracks from the upper side of Audubon Park to Henderson Street, the Louisiana Railway & Navigation Company, its successors and assigns, shall have the right to operate its own locomotives, cars and equipment over such portion of the tracks as is already built, and as may be built by the New Orleans & San Francisco Railroad Company, its successors and assigns, and for such privilege shall pay to the City of New Orleans such proportion of the sum provided in Clause (a) of this paragraph as the tracks so constructed and used by said Louisiana Railway & Navigation Company bear to the whole length of the tracks from upper city limits to Henderson Street.

* * * * *

"(f) That all controversies between the Louisiana Railway & Navigation Company on the one side, and the Public Belt authority; or any other Company or Companies to which the City or her Public Belt authority may grant the use of said tracks and appurtenances on the other side, relative to the use of said tracks and appurtenances or the cost of construction or maintenance thereof, or the rules and regulations relative to the movement and handling of cars, trains and traffic thereon and thereover shall be submitted to the arbitration of three disinterested persons, one to be selected by said Louisiana Railway & Navigation Company, the second by the Public Belt authority, or such other Company or Companies, as the case may be, and the third by the two thus chosen; and the decision of this tribunal, or any two of them, shall have the effect of an amicable composition. . . ."

plated that the New Orleans & San Francisco Railroad Company might fail to build and that this failure might be 'without legal excuse.' In that event, it was agreed that the plaintiff in error should step into the place of the other company and assume the burden of construction 'under the terms and conditions' of ordinance No. 1615, such construction to take the place of the pecuniary consideration for the use of the tracks. It was further apparent that the fulfillment of the plan of ordinance No. 1615 might be legally impossible and hence that the failure of the New Orleans & San Francisco Railroad Company might be legally excused. In this event, the plaintiff in error did not undertake to build and no right of construction was given to it. We cannot imply such a right. While we are to give to public grants a fair and reasonable interpretation (*United States v. Denver &c. Rwy. Co.*, 150 U. S. 1, 14; *Russell v. Sebastian*, 233 U. S. 195, 205), they are not to be extended by implication beyond their clear intent. The right of construction was given to the plaintiff in error in a particular contingency, and not otherwise; and the explicit provision for construction negatives an intention to bind the City to permit it in a case not specified. There was abundant reason for both expression and omission. The suit of the Dock Board was pending and whether the New Orleans & San Francisco Railroad Company would be able to build, as provided in ordinance No. 1615, was undecided. If that Company did build, the City was prepared to give, and, in that event did give, to the plaintiff in error the right of way upon the agreed payment; and if that Company failed to build 'without legal excuse' the City was ready to provide, and in that event did provide, that the plaintiff in error should build in its stead. But if there were legal excuse for a failure of the New Orleans & San Francisco Railroad Company to build, it was plainly desirable that neither party should be bound. In that case, as the terms

of the ordinance show, the plaintiff in error was unwilling to assume the burden of construction, and the City by not binding itself in that contingency preserved its freedom to deal as it might seem best with the exigency that would thus arise. Ordinance No. 1997 did not obligate the City to build the belt road or any part of it; it did not bind the City to cause the road to be built by others. As we read the ordinance, it was intended to confer rights exclusively with reference to an existing plan of construction, and if that plan proved abortive, because of legal obstacles to its fulfillment, no right was conferred upon the plaintiff in error.

It is urged that the provisions of Ordinance No. 1997 [§ 3, par. (c)] that the belt tracks to be constructed by the plaintiff in error, as soon as they were completed to Henderson Street, should be turned over to the 'immediate ownership of the city' and should be under the 'control and management' of the public belt authority, obviated the objection raised by the Dock Board with respect to Ordinance No. 1615. But an examination of other provisions of the ordinance shows that this 'control and management' was intended to be subject to certain limitations. Thus, it was provided in paragraph (f) that all controversies between the plaintiff in error and the public belt authority, or any other company or companies to which the use of the tracks might be granted, relating to the movement and handling of cars, trains and traffic thereon, should be submitted to three arbitrators, one to be selected by the plaintiff in error, the second by the public belt authority, or by such other company or companies, as the case might be, and the third by the two thus chosen, and that the decision of any two of these arbitrators was to have the effect of an 'amicable composition.' We find no reason to doubt the correctness of the conclusion that the conditions, subject to which the Dock Board approved the dedication for belt road purposes of

the portion of the proposed route under its jurisdiction, would have been violated under the plan of Ordinance No. 1997 as well as under that of Ordinance No. 1615. And, further, it is clear that the proviso in paragraph (c) which related to tracks to be constructed by the plaintiff in error, did not change the event in which alone the plaintiff in error was entitled to construct them, and this was in case the New Orleans & San Francisco Railroad Company should fail to build 'without legal excuse.'

Thus far we have assumed that the New Orleans & San Francisco Railroad Company was legally excused from building. But it is insisted by the plaintiff in error that this is not the case. That is, it is said that the grant of the right to construct was divisible and that, so far as the City was competent to provide for such construction, the New Orleans & San Francisco Railroad Company was bound to build the belt road and, therefore, that its failure to build to this extent was 'without legal excuse' within the meaning of paragraph (c). But Ordinance No. 1615 negatives this view. It explicitly provided for construction 'from the end of the rails on the upper side of Audubon Park to Henderson Street,' and that the city should furnish 'a clear legal right of way for the construction of said tracks.' We think that there is no basis whatever for the contention that the New Orleans & San Francisco Railroad Company was bound to construct a part of the belt road specified if, by reason of the successful opposition of the Dock Board, it was without power to build the remainder. And when the Dock Board prevailed in its suit, that Company was entitled to abandon, as it did abandon, the undertaking. This was the event which was carefully excluded by Ordinance No. 1997 in defining the contingency in which the plaintiff in error should build. The provision in paragraph (c) for the return of the securities, which were to be deposited by the plaintiff in error as security for the performance of its obligation, in case

it should be prevented 'from building said belt tracks or any portion of the same on account of the city not furnishing the right of way,' or 'by causes beyond its control,' tends to support, rather than to oppose, the view that the undertaking was regarded as an entirety; for all the securities were to be returned although the prevention related to a portion of the route only. We are also referred to the provision [§ 3, par. (d)] that in the event that the New Orleans & San Francisco Railroad Company should, from any cause, complete 'only a portion of the tracks' described, the plaintiff in error should have the right 'to operate its own locomotives, cars,' etc. 'over such portion of the tracks' as had already been built, and as might be built by the first-mentioned Company, for a proportionate part of the agreed payment. This clause, in view of the existing situation of the parties, was held by the state court to have reference to a contingency in which, the opposition of the Dock Board not having been successful, the Railroad Company had proceeded with its undertaking and, having built a part of the tracks, had failed to complete them; and this construction is in harmony with the other provisions of the ordinance. But, in fact, the event described in paragraph (d) did not happen, as no part of the road was built; and this clause in no way aids the contention that the New Orleans & San Francisco Railroad Company was under legal obligation to undertake a partial construction if it became legally impossible to carry out its undertaking as a whole.

We conclude that the contract upon which the plaintiff in error relies was subject, in any aspect, to a suspensive condition (Civil Code, La., Art. 2021), that the event in which the obligation was to arise did not happen, and hence that the subsequent enactment was not open to the objection raised.

Judgment affirmed.